Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

MARVIN FRANDSEN, JAN L. FRANDSEN, BRYAN MORRIS, FRANK J. CERVASIO, MARIANNE CERVASIO, DIAN HARDISON, and TONIANNE WYNER,

Petitioners,

v.

BREVARD COUNTY, FLORIDA, and BREVARD COUNTY SHERIFF PHIL WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS AND SANCTIONED UNJUST JUDICIAL PROCEDURES IN FAILING TO FIND THAT, ON ITS FACE, THE COUNTY'S ORDINANCE VIOLATES PETITIONERS' RIGHTS OF FREE SPEECH AND EXPRESSION WHERE THE ORDINANCE IS SUCH AN EGREGIOUS EXAMPLE OF VAGUENESS AND SUBSTANTIAL OVERBREADTH THAT EVEN THE COUNTY ATTORNEY WHO DRAFTED THE ORDINANCE AND THE LAW ENFORCEMENT OFFICERS WHO ENFORCED THE ORDINANCE CANNOT EXPLAIN OR DEFINE THE TERMS IN THE ORDINANCE.

II. WHETHER THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS IN FAILING TO FIND THAT, ON ITS FACE, THE ORDINANCE VIOLATES CONSTITUTIONALLY PROTECTED RIGHTS FOR THE FREE EXERCISE OF RELIGION BY PROHIBITING NUDITY AT PLACES OF WORSHIP, WHILE ALLOWING PUBLIC NUDITY FOR MANY SECULAR PURPOSES, WITHOUT A COMPELLING REASON FOR SUCH UNEQUAL TREATMENT.

III. WHETHER THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS IN FAILING TO SUBJECT THE ORDINANCE TO STRICT SCRUTINY EVEN THOUGH THE ORDINANCE IS A THINLY DISGUISED CONTENT-BASED LAW THAT REGULATES PROTECTED SPEECH.

IV. WHETHER THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS AND SANCTIONED UNJUST JUDICIAL PROCEDURES IN FAILING TO RULE THAT INADEQUATE — EVEN NONEXISTENT — GROUNDS EXIST TO SUBSTANTIATE THE "FINDINGS" IN THE ORDINANCE.

V. WHETHER THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS AND SANCTIONED UNJUST JUDICIAL PROCEDURES IN FAILING TO FIND THAT THE SHERIFF ARRESTED AND CHILLED PETITIONERS' FOR THEIR PROTECTED EXPRESSION, WHERE EVEN THE SHERIFF ADMITTED THAT PETITIONERS' NUDITY IS EXPRESSIVE CONDUCT.

VI. WHETHER THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS IN FAILING TO FIND A DENIAL OF EQUAL PROTECTION WHERE THE SHERIFF ENFORCED THE ORDINANCE AGAINST THOSE ENGAGED IN NATURIST PURSUITS AND POLITICAL EXPRESSION WHILE NOT ENFORCING THE ORDINANCE AGAINST THOSE ENGAGED IN COMMERCIAL ADULT ENTERTAINMENT OR AGAINST MAINSTREAM BEACH-GOERS.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Cited Authorities	vi
Table of Appendices	x
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions	1
Statement of the Case	2
Statement of Necessary Facts	2
Argument	8
I. The Court Of Appeal's Decision Conflicted With This Court's Rulings And Sanctioned Unjust Judicial Procedures In Failing To Find That, On Its Face, The County's Ordinance Violates Petitioners' Rights Of Free Speech And Expression Where The Ordinance Is Such An Egregious Example Of Vagueness And Substantial Overbreadth That Even The County Attorney Who Drafted The Ordinance And The Law Enforcement Officers Who Enforced The Ordinance Cannot Explain Or Define The Terms Of The Ordinance.	8

Contents

Page

II. The Court Of Appeal's Decision Conflicted With This Court's Rulings In Failing To Find That, On Its Face, The Ordinance Violates Constitutionally Protected Rights For The Free Exercise Of Religion By Prohibiting Nudity At Places Of Worship, While Allowing Public Nudity For Many Secular Purposes, Without A Compelling Reason For Such Unequal Treatment. 10

III. The Court Of Appeal's Decision Conflicted With This Court's Rulings In Failing To Subject The Ordinance To Strict Scrutiny Even Though The Ordinance Is A Thinly Disguised Content-Based Law That Regulates Protected Speech. 13

IV. The Court Of Appeal's Decision Conflicted With This Court's Rulings And Sanctioned Unjust Judicial Procedures In Failing To Rule That Inadequate — Even Nonexistent — Grounds Exist To Substantiate The "Findings" In The Ordinance. 18

V. The Court Of Appeal's Decision Conflicted With This Court's Rulings And Sanctioned Unjust Judicial Procedures In Failing To Find That The Sheriff Arrested And Chilled Petitioners For Their Protected Expression, Where Even The Sheriff Admitted That Petitioners' Nudity Is Expressive Conduct. 20

Contents

Page

VI. The Court Of Appeal's Decision Conflicted With This Court's Rulings In Failing To Find A Denial Of Equal Protection Where The Sheriff Enforced The Ordinance Against Those Engaged In Naturist Pursuits And Political Expression While Not Enforcing The Ordinance Against Those Engaged In Commercial Nude Entertainment Or Against Mainstream Beach-Goers. 21

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

CASES

Bowen v. Roy,
476 U.S. 693 (1986) 12

Cafe 207, Inc. v. St. Johns County,
856 F. Supp. 641 (M.D. Fla. 1994) 19

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 11, 12

City Council of City of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789 (1984) 20

City of Ladue v. Gilleo,
512 U.S. 43 (1994) 17

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) 19

Cohen v. California,
403 U.S. 15 (1971) 14

Employment Div., Dep't of Human Resources of Ore. v. Smith,
494 U.S. 872 (1990) 12

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1981) 13, 15

Cited Authorities

Page

Fisher v. King,
232 F.3d 391 (4th Cir. 2000) 18

Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,
170 F.3d 359 (3d Cir. 1999) 11

Gentile v. State Bar of Nevada,
501 U.S. 1030 (1991) 10

Hill v. Colorado,
530 U.S. 703 (2000) 9, 13, 17

Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston,
515 U.S. 557 (1995) 15

Kolender v. Lawson,
461 U.S. 352 (1983) 9

Levitan v. Ashcroft,
281 F.3d 1313 (D.C. Cir. 2002) 12

Reeves v. McConn,
631 F.2d 377 (5th Cir. 1980) 15

Roe v. Wade,
410 U.S. 113 (1973) 21

Schad v. Borough of Mount Ephraim,
452 U.S. 61 (1981) 19

Cited Authorities

Page

Tenafly Eruv Ass'n v. Borough of Tenafly,
309 F.3d 144 (3d Cir. 2002) 12

Tunick v. Safir,
228 F.3d 135 (2d Cir. 2000) 15

United States v. Eichman,
496 U.S. 310 (1990) 17

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803 (2000) 13, 16

Village of Willowbrook v. Olech,
528 U.S. 562 (2000) 21

Virginia v. Hicks,
123 S. Ct. 2191 (2003) 9

Wyner v. Struhs,
254 F. Supp. 2d 1297 (S.D. Fla. 2003) 15

UNITED STATES CONSTITUTION

U.S. Const., Amnd. 1 ..... *passim*

U.S. Const., Amnd. 14 1

Cited Authorities

Page

STATUTES

28 U.S.C. § 1254 1

28 U.S.C. § 1331 2

28 U.S.C. § 1343 2

28 U.S.C. § 2201 2

28 U.S.C. § 2202 2

42 U.S.C. § 1983 2

RULES

Rule 56 Fed. R. Civ. Pro. 2

Rule 57 Fed. R. Civ. Pro. 2

Rule 65 Fed. R. Civ. Pro. 2

OTHER AUTHORITY

Brevard County Ordinance 95-21 ..... *passim*

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed May 30, 2003 ..... 1a

Appendix B — Order Of The United States District Court For The Middle District Of Florida, Orlando Division Dated May 3, 2002 ..... 7a

Appendix C — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing En Banc Filed October 30, 2003 ..... 46a

Appendix D — Brevard County Ordinance 95-21 ... 48a

OPINIONS BELOW

The relevant opinions of the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit are unreported but are included in the Appendix to this Petition at A-1a through A-45a (The Appendix is abbreviated as A.)

STATEMENT OF JURISDICTION

The final order sought to be reviewed was entered on May 30, 2003. The order denying rehearing was entered on October 30, 2003. (A-46a.) The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

> wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Brevard County Ordinance 95-21 (Full text at A-48a).

STATEMENT OF THE CASE

This case involves facial and as-applied Free Expression, Free Exercise, and Equal Protection challenges to a Brevard County ordinance and to the enforcement of that Ordinance by the Brevard County Sheriff. The basis for federal jurisdiction in the court of first instance, which entered summary judgment under Rule 56 Fed. R. Civ. Pro. against Petitioners, is conferred by 28 U.S.C. § 1331, 28 U.S.C. § 1343, 28 U.S.C. § 2201, 28 U.S.C. § 2202, Rule 57 of the Federal Rules of Civil Procedure, Rule 65 of the Federal Rules of Civil Procedure, and 42 U.S.C. § 1983.

STATEMENT OF NECESSARY FACTS

All Petitioners herein have engaged in political and religious demonstrations, plays and other serious communications with a pro-nudity viewpoint and the content of nudity. (R1-2,3; R1-2,3,13,14; R1-3; R1-4; R1-4, Ex. B; R1-13; R1-13, 14.) On September 7, 1995, the President of Central Florida Naturists (CFN) faxed a letter to the Brevard County Sheriff to explain that CFN members would conduct a series of political/religious demonstrations at Playalinda Beach at the Canaveral National Seashore to protest Brevard

County's anti-nudity ordinance. (R78-Ex. 20,21,30; R78-Ex. 20,21,22; R148-3; R145-6; R146-1-5.) Petitioners Dr. Frandsen, Morris, the Cervasios, and other members of CFN carefully read the Ordinance and researched case law in order to comply with the Ordinance. (R78-Ex. 20,21,22.) Before the demonstration, several people confirmed Petitioners' belief that their nudity was necessary to convey their messages and that it would send a hypocritical, contrary, and/or wrong message to omit the nudity. (R78-Ex. 20,21,22; R145-1; R146-5-13.)

On September 8, 1995, Morris and the Cervasios were arrested while engaged in nude political/religious protest at Playalinda. (R78-Ex. 21,22.) On September 9, 1995, Dr. Frandsen and Morris were arrested under the Ordinance while engaging in similar activities. (R78-Ex. 20,22.)

During the Spring of 1996, CFN invited Petitioner Wyner to write and produce a play about Playalinda. (R1-12,13; R78-Ex. 21.) Wyner wrote her play entitled "Playalinda: The Beach," which contained nude scenes; e.g., historical scenes regarding the aboriginal inhabitants of what is now known as Playalinda. (R78-Ex. 21.) The play was cancelled the night before its planned opening (as was a later, similar play) because of fears of arrest under the Ordinance. (R78-Ex. 21.)

On July 7, 1996, Morris and the Cervasios were again arrested under the Ordinance by Sheriff's deputies while engaged in a political demonstration. (R78-Ex. 21,22.) Subsequently, Morris attempted to organize a nude sit-in for May 23-24, 1998, even obtaining a NPS permit for the sit-in, but the sit-in had to be cancelled because of fear of arrest under the Ordinance. (R78-Ex. 22,33.) To the Deputies

assigned to directly enforce the Ordinance and who arrested Dr. Frandsen, Mr. Cervasio, and Morris, it did not matter whether or not one was engaged in a political demonstration: "If you're nude, you're arrested." (R79-13-17; R81-4-6,9,16; R81-9; R82-31; R81-9-11,13-15,33.)

The Brevard County Commission enacted, and the Sheriff enforces, the Ordinance primarily because Naturist nudity allegedly has a bothersome emotional impact on certain members of the community with contrary religious and political views about the morality and desirability of Naturist recreation and of Naturist communication with the public. (R1-7; R79-21,22; R82-7-9; R82-71, R84-10-13.)

The Findings in Section 3 (and other sections) of the Ordinance consist of dictum and sections lifted from other ordinances without regard to accuracy or applicability, particularly the St. Johns County Ordinance regulating nudity in the context of adult entertainment. (R84-17-19, R1-Ex.A; R84-19,20.) All polls and other scientific data belie the Ordinance's findings, including the finding of adverse secondary effects. (R78-Ex. 4; R84-37,38; R1-Ex. A.) No significant evidence supports the Ordinance's finding of increased complaints about nudity. (R78-Ex.34; R78-Ex. 23; R80-49,50; R80-49,50; R78-Ex. 3; R84-38-40; R84-156,157; R78-Ex. 2.) All incidents of nudity related to anti-social conduct referenced in Incident Reports appear to be subject to prosecution under existing state statutes; e.g., Florida Statute 800.03 and 877.03. (R84-59.)

The Ordinance's claim in § 3(k) that studies from other communities were considered which purport to show numerous social harms accruing from unregulated public nudity is false, as no such studies were ever presented to or considered by the County. (R78-Ex. 36; R84-40.)

Visitor data belies the Ordinance's finding that unregulated Naturist nudity inhibits tourism. (R78-Ex. 35.) No data exist to show that tourism has been or would be substantially lessened due to nudity. The only advertising known to the County is an in-flight airline brochure extolling the nude beach at Playalinda as a desirable tourist destination. (R84-63-66.) No evidence exists that an "influx" of people who create adverse secondary effects are attracted by non-adult entertainment such as Playalinda. (R84-66,67.)

Brevard County makes no specific claim of adverse secondary effects created by citizens exercising Constitutional rights, or appearing nude in public as a part of a larger communication, apart from adult entertainment. (R1-7.) No scientific basis supports a finding that children imbued with conservative values are harmed by nudity. (R84-46-48,92,96; R84-51-54; R84-145,146; R84-50.) The decriminalization of simple public nudity is beneficial to society. (R78-Ex. 1,5.) The invalid findings are not severable because the intent and purpose of the Ordinance are expressly predicated on the facts stated in the Findings. (R1-Ex. A.)

Regarding the operative definitions in Section 4 of the Ordinance, those people presumed to be most knowledgeable about the meaning of the definitions (R78-Ex. 20) had vague, convoluted, vacillating, and contradictory notions of the meanings of many of the words and phrases used therein; e.g., "openly" (R79-5,6,9,13,48,54; R84-75,76); "pubic area" and/or "genitals" (R84-76-82); the underside of a human female breast (R80-4-6,26-28,69; R79-48-51; R84-84-92); "discernably turgid" (R81-43,44; R80-28; R79-52-54; R82-69-71; R84-96-99); "opaque" (R80-29-31; R84-82); "body paint, body dye, a tattoo, latex, or any similar

substances" (R80-31,32; R84-99-105,158-160); a place legitimately set apart for nudity (R84-105-110); and, someone who causes another to become turgid. (R84-111.)

County Attorney Knox, the drafter of the Ordinance, is unclear about the meaning of Exemption A in Section 6 and why it is in the Ordinance at all; and could not give any illustration of nudity that would fall under Exemption A. (R84-6,7; R84-111-115.) Exemption A appears to be so overbroad that it outlaws all nudity associated in any way with money; e.g., a photographer and nude model during a commercial photography session, or a doctor and patient during a paid physical examination. 95-21(6)(A)

Exemption 6(B) — as a whole or in its various parts — is "vague in meaning" (R78-23); e.g., "political demonstration" (R80-10,11,14,15; R82-46-47[1]); and, "necessary for." (R84-117-119.) Sheriff Williams actually admitted that a photograph showed Dr. Frandsen engaging in protected expression while being arrested under the Ordinance by Sheriff's Deputies. (R80-5,6,10-14; R78-Ex. 20,24, R82-5,6,18,19,46,47; R78-Ex.24.) Meanings of terms in Exemption B are unknown, vague, and/or subjective; e.g., "bona fide," "incidental to and necessary for," "genuine," "guise or pretense", "exploitation," and "commercial gain." (R81-35-37; R80-40; R82-64,65; R84-119,120, R84-120-122; R84-122-126.) The County admitted that no guideline exists in the Ordinance for a police officer to know when or how much nudity is necessary for the communication. (R84-144,145.)

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1. The transcript erroneously attributed to Mr. Edwards the word "informed" for this last use of the word "informal."

Regarding Exemption C, the meaning of the term "existing judicial decisions" is unknown, vague, and/or ambiguous. (R80-44-46; R79-23,25-28; R81-38.) The County even admitted that a person of ordinary intelligence might not understand Exemption C. (R84-126-129.)

Finally, if people in adult entertainment establishments "appeared nude with their breast exposed, . . . they would be in violation of the ordinance." (R82-35.) None of the Exemptions in the Ordinance apply to strip clubs or other adult entertainment establishments. (R83-14,15.) If an area was going to be set aside for nudity, "Zoning would not traditionally be used for that purpose. . . . [I]t would probably be done under this ordinance." (R84-44.) Nevertheless, the Ordinance has not been enforced at strip clubs or anywhere else away from Playalinda. (R80-48,62,67; R82-37; R81-15,16; R83-4,6-13; R78-Ex. 20, 23.)

ARGUMENT

I. THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS AND SANCTIONED UNJUST JUDICIAL PROCEDURES IN FAILING TO FIND THAT, ON ITS FACE, THE COUNTY'S ORDINANCE VIOLATES PETITIONERS' RIGHTS OF FREE SPEECH AND EXPRESSION WHERE THE ORDINANCE IS SUCH AN EGREGIOUS EXAMPLE OF VAGUENESS AND SUBSTANTIAL OVERBREADTH THAT EVEN THE COUNTY ATTORNEY WHO DRAFTED THE ORDINANCE AND THE LAW ENFORCEMENT OFFICERS WHO ENFORCED THE ORDINANCE CANNOT EXPLAIN OR DEFINE THE TERMS OF THE ORDINANCE.

Even though the undisputed evidence showed that the County Attorney who drafted the Ordinance and the Deputy Sheriffs who enforced the Ordinance were unable to define or explain many key terms of the Ordinance, and even though key terms of the Ordinance are clearly vague, ambiguous, contradictory, and/or overbroad, the lower courts failed to invalidate the Ordinance as required by binding precedent of this Court, especially because the clarity and specificity of a criminal law are at issue. In doing so, not only has the Court of Appeals decision decided an important question of federal law in a way that conflicts with relevant decisions of this Court, the Court of Appeals effectively sanctioned a departure from the accepted and usual course of summary judgment proceedings by a lower court as to call for an exercise of this Court's supervisory power.

More specifically, this Court's precedent requires a holding that the astonishing scope and overbreadth of Exemptions A and B of the Ordinance punish a "substantial" amount of protected free speech, in relation to the Ordinance's plainly legitimate sweep, and serve to invalidate *all* enforcement of the Ordinance, until a limiting construction or partial invalidation so narrows the Ordinance as to remove the threat or deterrence to constitutionally protected expression — especially because the Ordinance imposes criminal sanctions. *See Virginia v. Hicks*, 123 S. Ct. 2191, 2195-99 (2003). Also, the Ordinance is too vague and uncertain to provide meaningful guidance and enforcement because, *inter alia*, the undisputed evidence shows that those who drafted and enforced the Ordinance — as well as reasonable people of ordinary (or greater) intelligence — do not understand large and important portions of the Ordinance. "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *see also Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (holding inadequate guidelines may permit a standardless sweep allowing police to pursue their personal predilections). Here, the Ordinance authorizes and even encourages arbitrary and discriminatory enforcement because the Ordinance empowers police with unguided discretion to deny the right to speak altogether, as shown by the deputies' unlawful rationales in making the arrests of Petitioners — for example, the statement, "if you're nude, you're arrested." (R82-31.)

Petitioners, who appear to be of ordinary or greater intelligence, have studied and made good-faith efforts to comply with the Exemptions under the Ordinance. The fact

"that [a citizen] was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that [the rule] creates a trap for the wary as well as the unwary." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1031 (1991). Here, it seems impossible that the terms of the Ordinance are not vague and ambiguous, and that the Ordinance does not fail to instruct what is prohibited, when the District Court opines that "training" might remedy the misunderstandings of the County Attorney who drafted the Ordinance and of the Sheriff in charge of enforcing the Ordinance. The obvious question is, "If even the drafter doesn't understand, who could train?" Thus, the answer to whether the Ordinance conveys sufficiently definitive warning as to the prescribed conduct when measured by common understanding must be a resounding "No!"

II. THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS IN FAILING TO FIND THAT, ON ITS FACE, THE ORDINANCE VIOLATES CONSTITUTIONALLY PROTECTED RIGHTS FOR THE FREE EXERCISE OF RELIGION BY PROHIBITING NUDITY AT PLACES OF WORSHIP, WHILE ALLOWING PUBLIC NUDITY FOR MANY SECULAR PURPOSES, WITHOUT A COMPELLING REASON FOR SUCH UNEQUAL TREATMENT.

The Ordinance effectively bans several religions from practicing nude rituals, while allowing nudity for recreation and other secular purposes.

> [I]n circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to

> extend that system to cases of 'religious hardship' without compelling reason. [The government's] application of the ordinance's test of necessity devalues religious reasons * * * by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993).

Without compelling reasons to the contrary, exemptions made for secular reasons must also be made for religious reasons. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999). Here, the ban on nudity in the Ordinance's Section 5 applies to all "public places," which are broadly defined in § 4(e) to include a "meeting facility utilized by a religious . . . or similar organization." The term "meeting facility" is broad and on its face must include private homes where religious services are held as well as facilities owned by religious groups. No Exemptions exist even for religious facilities or religious meetings held in homes. In contrast, the Ordinance unjustifiably allows secular nudity for recreation or other purposes in § 4(d), § 4(d)(1-2), and § 6(a), § 6(d) and § 6(f).

The District Court, as affirmed by the Court of Appeals, appears to predicate the summary judgment on the premise that some Petitioners do not absolutely require nudity as part of their religious practices. However, necessity is of no moment in the constitutional analysis. Like whether nudity is necessary to the message, "conduct implicates the Free Exercise Clause if it is motivated by beliefs which are both sincerely held and religious in nature without regard to

whether it is mandatory." *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 171 (3d Cir. 2002) (quotation omitted); *Levitan v. Ashcroft*, 281 F.3d 1313, 1319 (D.C. Cir. 2002) (holding that requiring a religious practice be mandatory to warrant First Amendment protection finds no basis in binding case law). *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520 (applying general First Amendment principles to the ritual slaughter of various animals without reference to the sacrifices being compulsory to the exercise of the religion). Furthermore, in invalidating an ordinance on Free Exercise grounds, this Court stated:

> [B]ecause it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct," *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S., 872, 884 (1990). As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Ibid.*, quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (opinion of Burger, C.J.). Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.

Id. at 537-38 (some citations omitted). Here, the Ordinance, as reflected by the District Court's Order and the Court of

Appeal's affirmance, singles out Petitioners' nude religious practice for discriminatory treatment because application of a test of necessity devalues religious reasons for nudity by judging them to be of lesser import than nonreligious reasons. Thus, again, the United States Court of Appeals for the Eleventh Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

III. THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS IN FAILING TO SUBJECT THE ORDINANCE TO STRICT SCRUTINY EVEN THOUGH THE ORDINANCE IS A THINLY DISGUISED CONTENT-BASED LAW THAT REGULATES PROTECTED SPEECH.

This Court's precedent requires that the Ordinance's restrictions (e.g., that the nudity be necessary for the communication) and the Ordinance's findings (e.g., that nudity must be prohibited because it sends the wrong message) be subjected to strict scrutiny because those restrictions and findings result in a law that directly regulates speech. Government regulation of expressive activity is not "content neutral" if it is justified with reference to the content of regulated speech. *See Hill v. Colorado*, 530 U.S. 703, 720 (2000). *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (finding a law content-based because, in part, "the overriding justification for the regulation is concern for the effect of the subject matter on young viewers"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1981) (holding that nudity on a drive-in movie screen visible to passersby could not be suppressed because all the passersby had to do was avert their gaze to avoid the

nudity); *Cohen v. California*, 403 U.S. 15 (1971) (holding that a man walking in a courthouse corridor wearing a jacket displaying the phrase "Fuck The Draft" could not be forced into expressing his views by more socially acceptable means merely because women and children were exposed to the expletive). Here, the Ordinance directly regulates speech because the Ordinance's terms — cunningly couched in the negative and labeled as "Exemptions" — qualify and define the bounds of protected speech in ways that materially misstate and overly restrict the bounds permissible under the First Amendment. The ordinance also confers overbroad censorial powers upon police to subjectively interpret whether speech is "bona fide," "genuine," "incidental to and necessary for," "exploitation," and "commercial gain." As evinced by the testimony of County Attorney Knox (the Ordinance's drafter) and Sheriff Williams, such qualifiers are ordinarily considered and understood only in relation to the content and viewpoint of other examples of expressive nudity; e.g., a bra-burning demonstration, *Hair* and other mainstream plays. Also, the evidence shows that many people in this nation — and in Brevard County in particular — are very much engaged in wearing the least encumbering and most revealing swimsuits possible. The evidence that the Ordinance is not enforced against commercial strippers in g-strings or against mainstream beachgoers in thong bikinis — all of whom are indisputedly nude as defined by the Ordinance — but *is* enforced against those with political views, religious practices, and unadorned lifestyles that are loathed by certain special interest groups vividly demonstrates the clear and practical danger of viewpoint regulation induced by the vague terms of the Ordinance.

Exemption B's requirement that nudity be "necessary for" a communication in order to be considered protected

speech under the Ordinance is patently unconstitutional as a direct — albeit inverse — restriction on protected speech.[2] The law is clear that nudity is afforded First Amendment protection merely when combined with protected speech and where the nudity conveys a message that is likely to be understood by those who view it. *See, e.g., Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (holding also that a message need not even be particularized to be protected). While nudity per se may not be protected conduct under the First Amendment, it is protected as speech when merely combined with some mode of expression which itself is entitled to First Amendment protection. The law is well established by this Court and by the other courts that the government may not prescribe the means, method, or mode — including nudity — by which a communication is delivered. *See Erznoznik*, 422 U.S. at 215. "The mere existence of an alternative means of expression . . . cannot by itself justify a restraint on some particular means that the speaker finds more effective." *Reeves v. McConn*, 631 F.2d 377, 382 (5th Cir. 1980). *See also Wyner v. Struhs*, 254 F. Supp. 2d 1297 (S.D. Fla. 2003) (holding that people engaging in nude expression at a public beach were protected under the First Amendment); *Tunick v. Safir*, 228 F.3d 135 (2d Cir. 2000) (holding that injunction was proper to prevent police interference with photographer of nudes in public).

The Ordinance's intended effect of regulating speech is also shown by the Ordinance's findings that necessarily implicate communicative elements of nudity. "Where the

2. It is crucial to note that the granting of the Sheriff's Motion for Summary Judgment is predicated entirely on this point because the District Court found that a lack of necessity for the nudity created probable cause for arrests.

designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists." *Playboy Entertainment Group*, 529 U.S. at 813 (finding a law content-based because, in part, "the overriding justification for the regulation is concern for the effect of the subject matter on young viewers"). Here, the Ordinance's Findings and Exemptions regulate only that speech that has the content of expressive nudity, establishing the Ordinance's primary purpose as shielding conservative religious families from messages involving nudity: "[A]ppearing nude . . . often serves to impose such person's nudity on others who did not seek it out, who are not able to reasonably avoid observing it, and who may be offended or distressed thereby. . . ." 95-21(3)(C). (*See, e.g.*, R84-46-48,92-96, Def. Ex. 3 (County Commission Meeting Minutes of 5/4/95 and 5/18/95).) The Ordinance's intent to regulate speech is also implicit in its stated intent not to permit conveyance of a message that might be construed by some people that Brevard County is against conservative "family values" and that might deter people from visiting the Kennedy Space Center. *See* Ord. 95-21(3)(M-N). The Ordinance regulates speech because it forbids people "to exploit nudity for profit or commercial gain and to advertise outside of Brevard County and the State of Florida the availability of an opportunity for nudity in public places which are not places provided or set apart for nudity within Brevard County. . . ." *Id.* at (3)(Q). Also, the Ordinance regulates speech because it discourages "the influx into Brevard County of persons seeking to observe and/or participate in such nudity." *Id.* (3)(R). The Ordinance is inherently contrary to the constitutional mandate to restrict expressive nudity as little as possible. At the very least, a tension is present in Finding "P" that has fostered

overregulation of protected speech. A similar argument can be made regarding the Ordinance's emphasis on pre-1776 English common law, which did not recognize a right to free speech at all. *See* 95-21(3)(B), 95-21(5)(E). Furthermore, requiring that the nudity be necessary to the communication is a content-based restriction. *See* 95-01(6)(B).

Also, although the Ordinance describes itself as regulating conduct instead of speech and labels some clauses that actually regulate speech as "Exemptions," much of its regulation of speech is worded in the negative and is subject to the same strict scrutiny and burden of proof as if it expressly and forthrightly described itself as a content-based statute that regulates protected speech.

> [A]n exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people. Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the permissible subjects for public debate and thereby to control the search for political truth.

City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) (citations and quotations omitted). "Clever content-based restrictions are no less offensive than censoring on the basis of content." *Hill*, 530 U.S. at 767 (Kennedy, J., dissenting) (citing *United States v. Eichman*, 496 U.S. 310 (1990)). Here, merely labelling a regulation of speech an "exemption" should not save the Ordinance from the burden of proving its constitutionality where the so-called "exemptions" actually point out the content-based nature of the Ordinance.

Finally, the vague, ambivalent, and circular lip service paid to constitutional rights by the Ordinance's "savings" clauses cannot save the Ordinance. Restrictive and exclusionary provisions are not affected by their "attendant savings clause for constitutionally protected rights because the language of the savings clause is repugnant to the previous exclusionary language." *Fisher v. King*, 232 F.3d 391, 395 (4th Cir. 2000). Also, the Ordinance's clauses regarding the Constitution and judicial decisions are either meaningless axioms or ephemera. Thus, the Ordinance is content-based and should have been analyzed under strict scrutiny. This Court should grant certiorari review in order to apply the proper level of scrutiny to this content-based Ordinance.

IV. THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS AND SANCTIONED UNJUST JUDICIAL PROCEDURES IN FAILING TO RULE THAT INADEQUATE — EVEN NONEXISTENT — GROUNDS EXIST TO SUBSTANTIATE THE "FINDINGS" IN THE ORDINANCE.

The Ordinance's "findings" are without adequate evidentiary bases, and such lack of support, combined with myriad public policy considerations, require the invalidation of the Ordinance. Where such fundamental interests as the right to free speech are at issue, the constitution requires more than simply an articulation of some legitimate interest that the County could have had. This Court has not been satisfied merely because the legislators have mimicked another ordinance that has been found constitutional in another context; the government must also show that the articulated concern had more than merely speculative factual grounds, and that it was actually a motivating factor in the passage of

the legislation. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 69-73 (1981). *See also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 426 (2002) (discussing how shoddy data and reasoning can undermine regulatory ordinances). Here, importantly, the Ordinance contains language that was never contained in the ordinances at issue in *Cafe 207, Inc. v. St. Johns County*, 856 F. Supp. 641 (M.D. Fla. 1994); and this case presents facts and issues in a very different; i.e., non-adult entertainment; context. The distinctions truly are material, and mandate a very different outcome because Petitioners engaged in communications of a serious educational, artistic, religious, and political nature which do not have adverse secondary effects imputed to the non-core rights of adult entertainment. Thus, the admissions by the County of adoption of findings without regard to their validity or relevance to Brevard County shows that the County Commission did not reasonably rely upon evidence regarding key findings in the Ordinance; that those findings are clearly erroneous, arbitrary and/or wholly unwarranted; and, by the Ordinance's own terms, that the Ordinance is invalid without those essential findings.

V. THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS AND SANCTIONED UNJUST JUDICIAL PROCEDURES IN FAILING TO FIND THAT THE SHERIFF ARRESTED AND CHILLED PETITIONERS FOR THEIR PROTECTED EXPRESSION, WHERE EVEN THE SHERIFF ADMITTED THAT PETITIONERS' NUDITY IS EXPRESSIVE CONDUCT.

As even Sheriff Williams admitted, Dr. Frandsen was arrested while engaged in a political demonstration wherein Dr. Frandsen's nudity conveyed a message. Furthermore, it is undisputed that Morris and the Cervasios were arrested while demonstrating in ways materially identical to the way Dr. Frandsen was demonstrating.

Moreover, even if the Ordinance were not content based and subject only to intermediate scrutiny, Appellants should have been exempted from arrest under the Ordinance, and the Court of Appeals should have considered the issue and found the Ordinance unconstitutional as applied. A challenge to a statute on First Amendment grounds requires that where the statute has been applied, the Court then considers whether the statute is unconstitutional as applied. *See City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). Here, the Sheriff admitted that Petitioners' nudity should have been afforded First Amendment protection, and the evidence shows that the Sheriff's policy was for deputies to cite and/or arrest every person who refused orders to cover nudity and that any Exemptions for protected nude expression, whether mandated by the Constitution or by Section 6 of the Ordinance, were to be disregarded. Thus, the Court of Appeals should have considered Petitioners' as-

applied challenge, finding that the Sheriff's enforcement of the Ordinance violated the constitutional rights of all Petitioners.

VI. THE COURT OF APPEAL'S DECISION CONFLICTED WITH THIS COURT'S RULINGS IN FAILING TO FIND A DENIAL OF EQUAL PROTECTION WHERE THE SHERIFF ENFORCED THE ORDINANCE AGAINST THOSE ENGAGED IN NATURIST PURSUITS AND POLITICAL EXPRESSION WHILE NOT ENFORCING THE ORDINANCE AGAINST THOSE ENGAGED IN COMMERCIAL NUDE ENTERTAINMENT OR AGAINST MAINSTREAM BEACH-GOERS.

By enforcing the Ordinance against nude unpaid political/theatrical/religious expressionists such as Petitioners, and by not enforcing the Ordinance against nude commercial adult entertainers, the Sheriff has violated Petitioners' Equal Protection and Free Speech rights. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (internal quotations and citation omitted). When the challenged classification involves the exercise of a fundamental constitutional right, the court must examine the classification with strict scrutiny, and the classification must be narrowly tailored to serve a compelling state interest. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973). Here, the Sheriff's intentionally unequal enforcement of the Ordinance regarding strip clubs

vis-a-vis naturists is arbitrary, capricious, and without rational basis. Under the Ordinance, where a person who appears nude in a public place, even if such place is provided or set apart for nudity and even if such person is nude for the sole purpose of performing a legal function that is customarily intended to be performed within such public place, but such person is nude for the purpose of obtaining money or other financial gain for such person or for another person or entity, that person is not exempt under the Ordinance. *See* Ord. 95-21(6)(A). Here, the evidence shows that people in adult entertainment establishments who appeared nude would be in violation of the Ordinance and no Exemptions would apply. Nevertheless, Petitioners were arrested while commercial adult entertainers go nude without arrest. The Ordinance has not been enforced at strip clubs or anywhere else away from Playalinda Beach, including on those beaches where "non-expressive" "nudity" is prevalent; e.g., against mainstream beach-goers wearing thong bikinis that violate the Ordinance; and where those who are not adhering to naturist tenets generally congregate. (R80-48,62,67; R82-37; R81-15,16.)

No "duality" or "scheme" as hypothesized by the District Court either exists or need be constructed. General precepts of Equal Protection and selective enforcement doctrines should provide adequate guidance in determining that the anti-nudity Ordinance of general applicability is not limited or superseded by an earlier ordinance, especially when the two ordinances are readily compatible and no Exemption excuses the applicability of the general law. Also, if an area was going to be set aside for nudity, "Zoning would not traditionally be used for that purpose . . . — it would probably be done under the ordinance." (R84-44.) Besides, the anti-nudity Ordinance is replete with secular Exemptions for

secular venues, making it clear that the County Commission was familiar with granting the Exemptions it wanted and would have made one for adult entertainment had it so desired. Thus, Petitioners' Free Speech and Equal Protection rights have been violated, again because the Court of Appeal's affirmance conflicted with this Court's rulings.

CONCLUSION

Petitioners respectfully request that this Court grant certiorari to consider this case on its merits.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MAY 30, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-13293
Non-Argument Calendar

D. C. Docket No. 00-00661-CV-ORL-22D

MARVIN V. FRANDSEN, JAN L. FRANDSEN, et al.,

Plaintiffs-Appellants,

versus

BREVARD COUNTY, FLORIDA,
PHIL WILLIAMS, Brevard County Sheriff,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(May 30, 2003)

Before EDMONDSON, Chief Judge, DUBINA and MARCUS, Circuit Judges.

PER CURIAM:

Plaintiffs-Appellants, who are "naturists" who desire to engage in activities in the nude at Playalinda Beach,

in Brevard County Florida, brought this section 1983 action against Defendants-Appellees Brevard County and Sheriff Phil Williams, challenging the constitutionality of Brevard County's Anti-Nudity Ordinance. Plaintiffs sought declaratory and injunctive relief forbidding enforcement of the Ordinance and damages. In a lengthy and comprehensive opinion, the district court, concluding no genuine issue existed on the claimed constitutional violations, granted summary judgment in favor of Defendants. No reversible error has been shown; we affirm.

Brevard County Ordinance 95-21 (the "Ordinance") was enacted in May 1995 "to prohibit being nude in public places for the purpose of protecting societal order and morality and suppressing the adverse secondary effects that public nudity generates." Ordinance, § 2. Extensive findings of fact are recited in support of the Ordinance. Exempted from the prohibition against public nudity is public nudity that may not be constitutionally prohibited. Ordinance §§ 6(b)and (c).[1]

Plaintiffs argue that the Ordinance is subject to strict scrutiny because it is a content-based law that regulates protected speech. The district court concluded to the contrary: the Ordinance regulates the conduct of public nudity; it is content neutral and, therefore, the intermediate scrutiny test

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1. Section 6(b) exempts public nudity that cannot constitutionally be prohibited because such nudity "is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message. . . ." Section 6(c) exempts public nudity that "cannot constitutionally be prohibited . . . because it is otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions."

of *United States v. O'Brien*, 88 S.Ct. 1673 (1968), applies. We agree with the district court that (i) the Ordinance is a constitutional exercise of the County's police power; *see Cafe 207, Inc. v. St. Johns County*, 856 F.Supp. 641, 644 (M.D.Fla. 1994), *affirmed* 66 F.3d 272 (11th Cir. 1995);[2] (ii) the Ordinance furthers important governmental interests in protecting order and morality; (iii) those governmental interests furthered are unrelated to the suppression of free expression; and (iv) the incidental restriction on First Amendment freedoms, if any, is no greater than required; the *O'Brien* test is satisfied. *See id.*

No constitutional right to sunbathe or associate in the nude exists. *See South Florida Free Beaches, Inc. v. City of Miami, Florida*, 734 F.2d 608, 610 (11th Cir. 1984). Plaintiffs contend that the district court mischaracterized their claims by stating that they want to demonstrate in the nude. Plaintiffs claim no right to demonstrate in the nude *per se*. Instead, they seek redress of their claimed First Amendment right to use expressive nudity in combination with other protected speech as a medium to convey political and religious messages. When the nudity conveys a message likely to be understood by those who view it, Plaintiffs argue such expressive nudity is protected. But, as the Supreme Court observed in *O'Brien*, 88 S.Ct. At 1678, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." And, even if we were to accept that Plaintiffs's proposed conduct -- public

2. Our order affirming the judgment of the district court in *Café 207* was "for the reasons stated in [the district court's] dispositive memorandum opinion."

nudity -- could be expressive and protected, the savings provisions of the Ordinance exempts expressive nudity that constitutionally may not be prohibited.[3]

Plaintiffs also challenge the Ordinance as facially invalid claiming the Ordinance is both vague and overbroad. About Plaintiffs's vagueness argument, the district court relied on our application in *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318, 1329 (11th Cir. 2001), of the standard articulated in *United States v. Salerno*, 107 U.S. 2095 (1987), to conclude that Plaintiffs' facial challenge based on vagueness failed: Plaintiffs failed to carry the heavy burden of establishing that no set of circumstances exists under which the Ordinance would be constitutional; to the contrary, much activity could be prohibited validly under the Ordinance.

Plaintiffs nonetheless argue that the Ordinance is vague because it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited, and because it empowers law enforcement to engage in arbitrary and discriminatory enforcement. Plaintiffs focus especially on section 6(b)'s exemption from its sweep of nudity that is "necessary for" the conveyance of a message. But again as noted by the district court, this Court has rejected already a vagueness challenge to a virtually identical anti-nudity ordinance. *See Café 207*, 856 F.Supp. at 649-50. And, Plaintiffs focus especially on section 6(c)'s exemption of nudity otherwise protected by the United States or Florida constitutions or both "under existing judicial decisions." Again, as observed in *Café 207*, limitations of language that make it impractical or impossible to state with precision all

3. See footnote 1.

instances of protected public nudity do not render the exemption unconstitutionally vague.

No vagueness permeates the Ordinance; the Ordinance provides adequate notice about when nudity is proscribed. *See Horton v. City of Augustine*, 272 F.3d 1318, 1330-31 (11th Cir. 2001).

Plaintiffs's facial challenge based on overbreadth also is without merit. Again, as the district court noted, *Café 207*, 856 F.Supp. at 648, rejected a facial overbreadth challenge to a substantially similar ordinance. The general rule is that no facial challenge based on overbreadth may succeed unless the statute is shown to be unconstitutional in all its applications. *Williams v. Pryor*, 240 F.3d 944, 953 (11th Cir. 2000); *see also United States v. Frandsen*, 212 F.3d 1231, 1235 (11th Cir. 2000) (stating that "no set of circumstances" is the general rule for evaluating facial challenges in this circuit).

A limited exception to the "unconstitutional-in-every conceivable-application" rule has been suggested in cases raising a facial overbreadth challenge in the context of the First Amendment. *See, e.g., Horton*, 272 F.3d at 1331-32. As we observed in *Horton*, *id.*, this limited exception has application to prior restraints on speech; it allows challenge to permitting and licensing regulations not relevant here. And, even if the exception were to apply absent a prior restraint, it would apply only "when [a law] is 'substantially overbroad, that is, its application would be unconstitutional in a substantial proportion of cases.'" *Horton*, 272 F.3d at 1332, *quoting Ward v. County of Orange*, 217 F.3d 1350, 1355 (11th

Cir. 2000). The Ordinance exempts from its sweep constitutionally protected expression; its application could impose no constitutional infringement "in a substantial proportion of cases." We see no error in the district court's conclusion that protected expression inhibited by the Ordinance -- if any -- can be remedied on a case-by-case basis.

We also see no merit in Plaintiffs equal protection and freedom of religion claims.[4] And, no infirmity in the findings supporting adoption of the Ordinance has been shown.

After reviewing all claims advanced by Plaintiffs, we see no reversible error in the district court's grant of summary judgment in favor of Brevard County and Sheriff Phil Williams.

AFFIRMED.

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4. Plaintiffs claim an equal protection violation based on the Sheriff's enforcement of the Ordinance against naturists appearing nude on public beaches but not enforcing the Ordinance against adult entertainers appearing in adult entertainment establishments. A separate ordinance governs adult entertainment venues. No equal protection violation has been shown in this dual regulatory structure. About Plaintiffs freedom of religion claims, we reject facial invalidity based on the Ordinance's failure to except from its scope nudity engaged in in the course of religious meetings or ceremonies. And, even if a case-by-case adjudication could support an as-applied challenge, the Ordinance itself exempts from its scope constitutionally protected activity.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED MAY 3, 2002

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:00-cv-661-Orl-22DAB

MARVIN V. FRANDSEN, JAN L. FRANDSEN, BRYAN MORRIS, FRANK J. CERVASIO, MARIANNE CERVASIO, DIAN HARDISON, AND TONIANNE WYNER,

Plaintiffs,

-vs-

BREVARD COUNTY, FLORIDA, and BREVARD COUNTY SHERIFF PHIL WILLIAMS,

Defendants.

ORDER

I. INTRODUCTION

Plaintiffs are "naturists"[1] who desire to engage in nude sunbathing and other nude activities at Playalinda Beach,

1. "A naturist is a person who 'advocates a "clothing optional" lifestyle.'" *United States v. Frandsen*, 212 F.3d 1231, 1234 n.1 (11th Cir. 2000) (quoting *Naturist Soc., Inc. v. Fillyaw*, 958 F.2d 1515, 1517 (11th Cir.1992)).

located within the Canaveral National Seashore in Brevard County, Florida. Their ability to do so has been frustrated by Brevard County's enactment of an ordinance banning public nudity. This prompted Plaintiffs to conduct nude protests of the ordinance at Playalinda Beach. They also planned to perform a play at Playalinda involving nudity, written by Plaintiff Tonianne Wyner, but claim they were afraid to actually proceed with the performance for fear of arrest. The Sheriff of Brevard County, Phil Williams, has enforced the ordinance by arresting nudists at Playalinda, including some of the named Plaintiffs.

By means of this suit, the Plaintiffs sue Brevard County and the Sheriff pursuant to 42 U.S.C. § 1983. Plaintiffs contend the anti-nudity ordinance is unconstitutional; more specifically, they assert that it impermissibly infringes on their First Amendment rights of free expression and religious exercise, and is both vague and overbroad. Additionally, Plaintiffs claim the Sheriff has denied them equal protection by enforcing the ordinance against naturists while ignoring nude performers in adult entertainment establishments.

The parties have filed cross-motions for summary judgment. Upon considering the parties' extensive submissions, the Court determines that the Defendants are entitled to summary judgment on all of the Plaintiffs' claims.

II. THE ORDINANCE

Brevard County Ordinance 95-21, entitled "Brevard County Public Nudity Ordinance," was enacted in May 1995. It provides as follows:

Appendix B

Section 2. *Intent.* It is the intent of the Board of County Commissioners, in enacting this ordinance, to prohibit the conduct of being nude in public places for the purpose of protecting societal order and morality and suppressing the adverse secondary effects that public nudity generates, as more specifically described in the findings. It is the intent of this ordinance to protect and preserve the health, safety and welfare of the people of Brevard County by prohibiting any person from knowingly or intentionally appearing nude in a public place, or knowingly or intentionally causing or permitting another person to appear nude in a public place, within the municipalities and unincorporated areas of Brevard County embraced by this ordinance, subject to certain exceptions.

Section 3. *Findings.*

The Board of County Commissioners finds and determines as follows:

a. since the beginning of civilization, appearing nude in a public place which is not a public place provided or set apart for nudity has been considered improper (see Moffett v. State, 340 So. 2d 1155, 1156, n.3 [Fla. 1977]; and

b. appearing nude in a public place which was not a public place provided or set apart for nudity was a criminal offense at common law and was

considered an act malum in se (wrong in itself); and

c. appearing nude in a public place which is not a public place provided or set apart for nudity is engaging in conduct which often serves to impose such person's nudity on others who did not seek it out, who are not able to reasonably avoid observing it, and who may be offended or distressed thereby and

d. there is a location in Brevard County, specifically the extreme north end of Playalinda Beach (the area north of parking area # 13), which has historically been frequented by nude sunbathers, and

e. efforts by the State and Federal governments to apply Florida criminal statutes have been rejected by the courts since, under certain applicable criminal laws, nudity alone cannot be prosecuted without proof of lewd and lascivious conduct, and

f. since the rulings of the courts on the non-enforceability of criminal statutes against persons merely appearing nude on Playalinda Beach, people have begun appearing nude on other portions of the beach which have not been historically used by nude sunbathers, and

g. since the above referenced rulings, there has been a documented increase in the number of

complaints about persons engaged in open displays of sexual activity as well as lewd and lascivious conduct on all portions of Playalinda Beach; and

h. since the above referenced rulings, there has been a documented increase in the number of complaints about persons flaunting their nudity in front of persons, including children, who chose not to appear nude in public places, and

i. the Board finds that appearing nude in a public place, including a beach area such as Playalinda, which is not a public place provided or set apart for nudity is still subject to general disapproval by the people of Brevard County; and

j. nude sunbathing is not constitutionally protected [South Florida Free Beaches v. City of Miami]; and

k. the appearance of persons in the nude in places which are not public places provided or set in public apart [sic] for nudity has been found, by other communities in Florida, to have generally increased incidents of prostitution, sexual assaults and batteries; attracted other criminal activity to the community; encouraged degradation of women and facilitated other activities which break down societal family structures and values; and

Appendix B

l. without regulation, appearing nude in a public place which is not a public place provided or set apart for nudity constitutes conduct which adversely affects the health, safety and welfare of members of the public who chose not to appear nude in public places; and

m. Brevard County is a family-oriented area; and

n. Brevard County beaches and northern Brevard County is an area that is known for and whose economy is largely dependent upon tourists and family oriented attractions, such as the Kennedy Space Center, and

o. the Board finds from correspondence that Board members have received, that nudity on public beaches, in particular Playalinda Beach, has caused some tourists to express their intent not to frequent Brevard County beaches, and

p. regulation of public nudity will protect and preserve the public health, safety and welfare of the people of Brevard County by restricting, to the fullest extent allowed by the United States Constitution and Florida Constitution, the act of being nude to nonpublic places or public places provided or set aside for nudity; and

q. non-regulation of persons appearing nude in public places which are not public places provided or set apart for nudity within the [sic] Brevard

Appendix B

County would encourage entities and persons to exploit nudity for profit or commercial gain and to advertise outside of Brevard County and the State of Florida the availability of and opportunity for nudity in public places which are not places provided or set apart for nudity within Brevard County, and

r. non-regulation of persons appearing nude in public places which are not public places provided or set apart for nudity would encourage the influx into Brevard County of persons seeking to observe and/or participate in such nudity, and to participate in the secondary effects of such nudity, including disorderly, harmful, illegal and open sexual activity that is associated therewith, thereby inhibiting open access to public facilities and causing potential harm to the health, safety and welfare of Brevard County residents and other persons who choose not to appear nude in public places; and

s. the prohibitions contained in this ordinance are the most reasonable and minimum restrictions required so as to regulate the conduct of public nudity which the Board finds to be conduct adverse to public order and morality within Brevard County, when such conduct occurs in a public place which is not a public place provided or set apart for nudity; and

t. states may regulate the conduct of appearing nude in public places which are not public places provided or set apart for nudity (see Barnes v. Glen Theatre[,] Inc. 111 S.Ct 2456, 115 L.Ed.2d 504 [1991]); and

u. the exemptions contained in this ordinance provide adequate protection to persons who, without such exemptions, might be prevented or discouraged by this ordinance from exercising constitutionally protected rights; and

v. this ordinance regulates conduct, not speech.

Section 4. *Definitions.*

a. "Entity" means any proprietorship, partnership, corporation, association, business trust, joint venture, joint-stock company or other for profit and/or not for profit organization.

b. "Nude" means to openly display or expose,

1) the human male or female genitals or pubic area with less than a fully opaque covering; or

2) any portion of the anal cleft or cleavage of the male or female buttocks. Attire which is insufficient to comply with this requirement includes, but is not limited to, G-strings, T-back bathing suits, thong bikinis, dental floss or any other clothing or covering that does not

completely and opaquely cover the anal cleft or cleavage of the male or female buttocks; or

3) the portion of the human female breast directly or laterally below a point immediately above the top of the areola with less than a fully opaque covering. This definition shall include the entire lower portion of the human female breast, including the areola and nipple, but shall not include any portion of the cleavage of the human female breast exhibited by a dress, blouse, shirt leotard, bathing suit or other clothing, provided the areola is not exposed; or

4) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

For purposes of this definition, body paint, body dye, a tattoo, latex or any similar substances shall not be considered an opaque covering.

c. "Person" means any human being at least ten (10) years of age.

d. "Public place provided or set apart for nudity" means an enclosed public restroom; an enclosed functional shower or locker room facility; an enclosed sauna; a motel room or hotel room designed and intended for sleeping accommodations; or at the enclosed or isolated location of a bona fide private club whose membership as

a whole engages in social nudism or naturism (a nudist resort or camp); and any similar public places in which nudity is necessarily and customarily expected outside of the home (example: doctor's office or hospital) or where a nude person would have a constitutionally protected expectation of privacy. The term also includes any area or land:

1) which is under the ownership or control of the Federal or State government and

2) which the Federal or State government has specifically and expressly designated, with signage or otherwise, as a location where nude sunbathing is permitted. Signs which only warn of possible encounters with nude sunbathers, or any similarly worded sign, shall not be deemed to constitute a specific or express designation of an area for nude sunbathing.

e. "Public place" means any location open to the common and general use, participation, or enjoyment of the public where the public is present or likely to be present, or any location where the public is invited and is free to go upon special or implied invitation, or any location where a person may reasonably be expected to be observed by the public. A public place includes, but is not limited to, a street, sidewalk, park, beach, business or commercial establishment (whether for profit or not for profit and whether open to the public at large or where entrance is limited by a cover

charge or membership requirement), bottle club, hotel, motel, restaurant, night club, country club, cabaret or meeting facility utilized by a religious, social, fraternal or similar organization.

Section 5. *Public nudity.* Subject to the exemptions set forth in Section 6 below, it shall be unlawful for any person to knowingly or intentionally:

a. appear nude in a public place; or

b. cause or permit another person to appear nude in a public place; or

c. sunbathe nude in a public place; or

d. appear nude in a public place in such a manner as to be in violation of § 877.03, Florida Statutes; or

e. appear nude in a public place in such a manner as to be in violation of the common law of England as adopted by § 775.01, Florida Statutes.

Section 6. *Exemptions.* The offense of public nudity contrary to Section 5 above shall not be deemed to have occurred in any of the following instances:

a. when a person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose of performing a legal

function that is customarily intended to be performed within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity; or

b. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example, Barnes v. Glen Theatre Inc., __ U.S., 111 S.Ct. 2456,115 L.Ed.2d 504 [1991]; and Hoffman v. Carson, 250 So.2d 891 [Fla. 1971]); or

c. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it is otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions; or

d. where a person appears nude in any area which has been designated, by the Federal or State government as a public place provided or set apart for nudity;

e. when a mother is breast-feeding her baby; or

f. where a person appears nude in any area which is owned or controlled by the Federal or State government and it is judicially or legislatively determined that the County has no jurisdiction or authority to exercise its police power in that area.

Section 7. *Violation of Section 5/Penalty.* Any person who violates Section 5 above shall be prosecuted in the same manner as misdemeanors are prosecuted. Upon conviction, a violator shall be punished by a fine not to exceed $500.00 or by imprisonment in the county jail not to exceed 60 days, or by both such fine and imprisonment. This enforcement procedure and penalty for violations of this ordinance is adopted under the express authority of sec. 125.69(1)[,] Florida Statutes.

Section 8. *Severability.* If any section, subsection, sentence, clause, phrase, word or provision of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such invalid unconstitutional portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions of this ordinance, provided the remaining portions effectuate [the] purpose and intent of this ordinance.

Appendix B

> Section 9. *Area Embraced.* This ordinance shall be effective in all municipalities and in the unincorporated area of Brevard County.

Exhibit "A" to Doc. 57.

III. BACKGROUND[2]

Plaintiffs Dr. Marvin V. Frandsen, Jan L. Frandsen, Frank J. Cervasio, Marianne Cervasio and Bryan Morris are officers and/or members of an organization known as Central Florida Naturists, Inc. ("CFN"). They and Plaintiff Dian Hardison reside either in Brevard County or neighboring Orange County. Plaintiff Tonianne Wyner is a resident of St. Lucie County, Florida. She has written, directed and produced plays with naturist themes involving nudity.

This suit is merely one skirmish in the Plaintiffs' long-running battle with various government entities concerning the regulation of nudity, and protests against such regulation, at Playalinda Beach and other public recreation areas. *See United States v. Frandsen*, 212 F.3d 1231 (11th Cir. 2000); *Frandsen v. County of Brevard*, 800 So.2d 757 (Fla. 5th DCA 2001); *DeWald v. Wyner*, 674 So.2d 836 (Fla. 4th DCA 1996); *Naturist Soc., Inc. v. Fillyaw*, 958 F.2d 1515 (11th Cir. 1992). Confronted by the legal obstacle that there is no constitutional right to sunbathe or associate in the nude, *see South Florida Free Beaches, Inc. v. City of Miami, Fla.*, 734 F.2d 608, 610 (11th Cir. 1984), Plaintiffs

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2. Some of the facts set forth herein are derived from the admitted facts section of the parties' Joint Pretrial Statement. *See* Doc. 121, § IX, at 20-24.

have attempted to "dress up" their otherwise unprotected conduct in the clothing of the First Amendment for the purpose of mounting a constitutional challenge to Brevard County's anti-nudity ordinance.

Frandsen, Morris and the Cervasios were arrested in 1995 and 1996 for violating Brevard County's anti-nudity ordinance while conducting demonstrations against the ordinance at the Canaveral National Seashore. It is undisputed that these Plaintiffs were nude at the time of their arrests. It is not necessary for present purposes to recount all of the details of these protests and arrests. In summary, the demonstrators displayed protest signs bearing such statements as: "TODAY'S BLUE LIGHT SPECIAL — CLOTHES HALF OFF," "IF GOD WANTED US NUDE, WE WOULD BE BORN THAT WAY," "CANAVERAL NATIONAL SEASHORE, UNDER NEW MANAGEMENT BY BREVARD CO. COMMISSION," "ANTI-BIGOTRY THE COUNTY COMMISSION'S NEW CLOTHES," "PROTEST THE MANDATORY TAN LINES ORDINANCE," and "BSO HAS TO GO!"[3] Some demonstrators wore hats and wrist/ankle bands displaying protest language and/or symbols. Finally, some of the protesters made speeches concerning the ordinance and its enforcement. It is clear that the words spoken, and written messages exhibited, by the protesters constituted expression traditionally entitled to First Amendment free speech protection.

In 1996, CFN invited Plaintiff Wyner to write and produce a play about Playalinda Beach. In response, Wyner

3. BSO is a reference to the Brevard County Sheriff's Office.

created a work entitled "Playalinda, The Play and The Beach". According to Plaintiffs, the play contained nude scenes of historical significance regarding the aboriginal inhabitants of Playalinda Beach. Plaintiffs further assert that the play was scheduled to be performed at Playalinda during 1996, but was cancelled due to fears of arrest under the ordinance. Plaintiffs also maintain that a separate play written by Wyner and intended to be performed during 1996 at a former-adult entertainment establishment in Brevard County was cancelled for the same reason.

IV. SUMMARY JUDGMENT STANDARDS

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "The party seeking summary judgment bears the initial burden of identifying for the district court those portions of the record 'which it believes demonstrate the absence of a genuine issue of material fact.'" *Cohen v. United American Bank of Cent. Fla.*, 83 F.3d 1347, 1349 (11th Cir. 1996) (quoting *Cox v. Administrator U. S. Steel & Carnegie*, 17 F.3d 1386, 1396, *modified on other grounds*, 30 F.3d 1347 (11th Cir.1994), *cert. denied*, 513 U.S. 1110 (1995)). "There is no genuine issue for trial unless the non-moving party establishes, through the record presented to the court, that it is able to prove evidence sufficient for a jury to return a verdict in its favor." *Cohen*, 83 F.3d at 1349. The Court considers the evidence and all inferences drawn therefrom in the light most favorable to the non-moving party.

See Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 918 (11th Cir. 1993), *reh'g and reh'g en banc denied*, 16 F.3d 1233 (11th Cir. 1994).

V. ANALYSIS

A. Freedom of Expression

At the outset, the Court rejects Plaintiffs' suggestion that nudity is a necessary component of their demonstration against the ordinance, i.e., that their messages of protest cannot be conveyed unless they are nude.[4] As Defendants note, to accept this position is to essentially embrace the proposition that the Plaintiffs have a right to break a law in order to protest it. Plaintiffs have no more right to appear nude while protesting the ordinance than any person would have to smoke marijuana or ingest cocaine while demonstrating against laws banning the illegal use of controlled substances.[5] Plaintiffs remain free to protest against Brevard County's public nudity ordinance, but not while completely nude.[6]

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4. Ironically, a contrary ruling would deal an equally serious blow to Plaintiffs' free speech challenge to the ordinance. In other words, if the nudity exhibited by the protesters *was* protected expression, then it would fall within the exemptions set forth in § 6.b & c., thereby strengthening the Defendants' argument that the ordinance is constitutional under the First Amendment.

5. Because the Plaintiffs who were arrested at Playalinda in 1995 and 1996 were undisputedly nude, and their protest activities did not transform their nudity into protected expression, the Sheriff's deputies had probable cause to arrest them for violating the ordinance.

6. To support their argument that nudity is protected expression when combined with protest, Plaintiffs advert to the following

(Cont'd)

Appendix B

The Court also rejects Plaintiffs' argument that Brevard County's anti-nudity ordinance is subject to strict scrutiny because it is a "thinly disguised law that regulates speech." Doc. 75, ¶ 3, at 1. To the contrary, the ordinance regulates the conduct of public nudity, not speech. It is content-neutral, and even contains exceptions designed to preserve constitutionally-protected expression, like a substantially similar ordinance banning public nudity in Orange County. *See Gatena v. County of Orange*, 80 F. Supp. 2d 1331 (M.D. Fla. 1999), *aff'd*, 226 F. 3d 649 (1 lth Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001). Accordingly, the ordinance must be analyzed under the intermediate-scrutiny test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968). *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991); *Gatena*, 80 F. Supp. 2d at 1335-41; *Café 207, Inc. v. St. Johns County*, 856 F. Supp. 641, 643-46 (M.D. Fla. 1994), *aff'd*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996). Under the *O'Brien* standard, "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial

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language in *South Florida Free Beaches, Inc. v. City of Miami, Fla*: "[n]udity is protected as speech only when combined with some mode of expression which itself is entitled to first amendment protection." 734 F.2d at 610. Plaintiffs make too much of this language. *South Florida Free Beaches* does not say nudity is *always* protected when combined with protected expression, it merely indicates that nudity *cannot* be protected *unless* so combined. If the language were as broad as Plaintiffs suggest, Plaintiffs would be able to insulate themselves from prosecution under the ordinance merely by donning a ball cap bearing the American flag or discussing politics with a passerby while appearing naked in public. This Court cannot accept such an absurd construction of the First Amendment.

governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377. Each of these factors will be separately addressed.

1. Whether the ordinance is within Brevard County's constitutional power.

Section 2 of the ordinance expressly states that the Board's intent in enacting the measure is to protect societal order and morality, and to protect and preserve the health, safety and welfare of Brevard County's citizens. Unquestionably, regulation of these matters is within Brevard County's traditional police power to provide for the public health, safety, and morals. *See Gatena*, 80 F. Supp. 2d at 1339; *Café 207*, 856 F. Supp. at 644. Accordingly, the ordinance satisfies the first *O'Brien* prong.

2. Whether the ordinance furthers an important or substantial governmental interest.

The ordinance furthers the important and substantial governmental interests of protecting public order and morality, and in combating the negative secondary effects of public nudity. *See Gatena*, 80 F. Supp. 2d at 1339-40; *Café 207*, 856 F. Supp. at 644: The ordinance is replete with findings concerning these negative secondary effects. Plaintiffs expend considerable energy in attempting to controvert these and other findings. However, as Judge William Terrell Hodges noted in *Café 207*, "[e]vidence about

secondary effects or, rather, the lack of them, is . . . clearly foreclosed." 856 F. Supp. at 645. Even if such an inquiry were permitted, all that is required is that the government entity have "some factual basis" for its conclusions concerning secondary effects. *Flanigan's Enterprises, Inc. of Georgia v. Fulton County, Ga.*, 242 F.3d 976, 985, *reh'g and reh'g en banc denied*, 254 F.3d 77 (11th Cir. 2001), *pet. for cert. filed*, 70 USLW 3091 (July 23, 2001) (No. 01144).[7]

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7. *Flanigan's Enterprises* suggests that the government entity's reliance on evidence concerning secondary effects must also be reasonable. *See* 242 F.3d at 987. However, a careful reading of the opinion suggests that this requirement may be limited to measures banning nude dancing in establishments licensed to sell liquor, and does not apply to ordinances banning all public nudity. In that regard, *Flanigan's Enterprises* states:

> We realize that our decision today appears to result in constitutional fact finding, in which the constitutionality of an ordinance will depend on local conditions. However, we have no choice; we are bound by the decisions of the Supreme Court and the law of our circuit. *To be sure, Defendants may respond by enacting a ban on all public nudity; the Supreme Court has upheld that. See* [*City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000)]; *see also* [*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)]. However, Defendants may not ban nude dancing in establishments licensed to sell liquor without any factual basis to support the claim that these establishments are connected with negative secondary effects.

242 F.3d at 986-87 (emphasis supplied). *Flanigan*'s is also distinguishable on the basis that in that case "the county's own studies negated the very interests it purportedly sought to prevent." *Id.* at 986.

(Cont'd)

In the instant case, the minutes of the Board of Commissioners' meetings and other evidence considered by the Board (such as police reports, citizen complaints, and findings of other Florida communities) constitute, as a matter of law, a sufficient factual basis for the Board's findings, including those pertaining to negative secondary effects. Finally, even if some of the findings set forth in the ordinance are erroneous (e.g., whether public nudity is subject to general disapproval by the county's residents), the severability provision in § 8 saves the ordinance. Accordingly, the ordinance satisfies the second *O'Brien* requirement.

3. Whether the County's interest in prohibiting public nudity is unrelated to the suppression of free expression.

The following language from *Gatena* is instructive on this point:

> Under *O'Brien's* third prong, the County's interest in prohibiting public nudity is unrelated to the suppression of free expression. Contrary to Gatena's argument, the purpose of the Ordinance

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Accordingly, the Eleventh Circuit concluded: "We simply cannot find it reasonable for a government entity to conduct studies on specific areas and then to reject the conclusions thereof in favor of studies from different cities and different time periods." *Id.* at 987. This circumstance is not present in the instant case. In any event, even if the additional element of reasonable reliance applies to this case, no reasonable jury could find from the evidence presented that the Board's reliance on the matters it considered was unreasonable *at the time the ordinance was enacted.*

is to control the adverse effects of public nudity, not expressive activity. The *Barnes* Court found a similar public indecency statute to be unrelated to suppression of free expression, stating that

> [t]he perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at the beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity.

Barnes, 501 U.S. at 571, 111 S.Ct. 2456.

80 F. Supp. 2d at 1340.

Based on this reasoning, this Court determines that Brevard County's interest in prohibiting public nudity is unrelated to the suppression of free expression. The Court rejects Plaintiffs' argument that various of the exceptions in the ordinance render it content-based. *Gatena* dismissed such an argument directed at language virtually identical to the "bona fide live communication" exception set forth in § 6.b. *See* 80 F. Supp. 2d at 1335-39. Further, construing language substantially similar to § 6.b, Judge Hodges stated in *Café 207*: "The exception was clearly intended to stake out those theatrical performances involving nudity with artistic value so as to be non-obscene and within the protection of the First

Amendment." 856 F. Supp. at 649; *see also*, *Gatena*, 80 F. Supp. 2d at 1341 ("the Ordinance's incidental nudity exemption attempts to save some forms of expressive nudity which constitutionally cannot be prohibited;" discussing third *O'Brien* element). Section § 6.c — exempting nudity that cannot constitutionally be prohibited — is even less offensive. Accordingly, the third *O'Brien* element is satisfied.

4. Whether the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the County's interest in prohibiting public nudity.

It is doubtful that the ordinance infringes on Plaintiffs' First Amendment freedoms at all, let alone incidentally, given that (a) nude sunbathing and association are not constitutionally protected, (b) the act of appearing nude in public is not necessary to communicate Plaintiffs' objections to the ordinance, and (c) the savings provisions in § 6.b and .c exempt public nudity that cannot constitutionally be prohibited. However, assuming some incidental restriction, the specific prohibitions set forth in the ordinance are no greater than is essential to the Board's interest in banning public nudity. As recognized in *Gatena* and *Café 207*, anti-nudity ordinances can constitutionally require persons to "cover-up." *See* 80 F. Supp. 2d at 1341; 856 F. Supp. at 645-46. Concerning the extent to which specified body areas must be covered, Judge Hodges made clear that more than pasties and a g-string may constitutionally be required. *See* 856 F. Supp. at 645-46. In that regard, he observed that "the Supreme Court has been 'loath to second-guess the Government's judgment' with respect to the degree of regulation

necessary to further the government's legitimate interests." 856 F. Supp. at 646 (quoting *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 478 (1989)). The amount of clothing required by Brevard County's ordinance is not so great as to violate the Constitution. Accordingly, the ordinance satisfies *O'Brien's* fourth element.

Since Brevard County's anti-nudity ordinance passes the *O'Brien* test, the Defendants are due summary judgment on the Plaintiffs' claim that the measure violates their First Amendment right to free expression.

B. Vagueness

Plaintiffs' facial challenge[8] based on vagueness is subject to the following standards enunciated in *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318 (11th Cir. 2001):

> "A facial challenge, as distinguished from an as-applied challenge, seeks to invalidate a statute or regulation itself." *United States v. Frandsen*, 212 F.3d 1231, 1235 (11th Cir.2000). The general rule is that for a facial challenge to a legislative enactment to succeed, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95

8. It appears doubtful from Plaintiffs' summary judgment memoranda pertaining to Defendant Brevard County (Docs. 76 & 92) that Plaintiffs are raising an "as-applied" vagueness challenge. If they are, Defendants are entitled to summary judgment on that claim, as well.

> L.Ed.2d 697 (1987). "The fact that [a legislative act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. . . ." *Id.* This "heavy burden" makes such an attack "the most difficult challenge to mount successfully" against an enactment. *Id.*

272 F.3d at 1329.

Plaintiffs have not met their "heavy burden" in this case. Unquestionably, there are a whole host of circumstances — including nude sunbathing — which the ordinance may validly prohibit. Hence, Plaintiffs' vagueness challenge fails.

The same result applies even if the provisions of the ordinance are subjected to more intense scrutiny.[9] Plaintiffs raise numerous arguments concerning the language of § 6.b, which exempts nudity that cannot constitutionally be prohibited "because it constitutes a part of a bona fide live communication, demonstration or performance . . . wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression[.]" However, this Court has already rejected a vagueness challenge to an exception, in another county's anti-nudity ordinance, identical to § 6.b. *See Gatena*, 80 F. Supp. 2d at 1341; *see also*, *Café 207*, 856 F. Supp. at

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9. Notwithstanding its determination that the ordinance in *Horton* was not facially vague under *Salerno*, the *Horton* panel noted that "certain inroads into *Salerno*'s rule have developed." 272 F.3d at 1330. Accordingly, the panel alternatively analyzed the specific provisions of the ordinance at issue in that case. *Id.* at 1330-31.

649-50 (rejecting vagueness challenge to virtually identical language). As Judge Hodges stated in *Café 207*, "[m]erely because it is impractical if not impossible to precisely describe in words all of the types of nude performances falling within the protection of the First Amendment does not make the exception unconstitutionally vague. Case-by-case adjudication is required and will satisfy the due process requirements of the Fourteenth Amendment." 856 F. Supp. at 649. Accordingly, this Court concludes that § 6.b is sufficiently definite to pass constitutional muster.

In similar fashion, Plaintiffs attack § 6.c, which exempts nudity "otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions[.]" Plaintiffs argue that the "under existing judicial decisions" language is impermissibly vague. This Court disagrees. That language is sufficiently definite to satisfy due process requirements. "Existing judicial decisions" are precisely what this Court would be required to examine in order to determine whether conduct falls within the protection of the First Amendment.

Plaintiffs' other vagueness arguments are equally meritless. Accordingly, the Court concludes that the Defendants are entitled to summary judgment on Plaintiffs' vagueness challenge.[10]

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10. To support their vagueness arguments, Plaintiffs place much emphasis on the fact that a number of deponents aligned with the Defendants evidenced confusion about the meaning of various terms of the ordinance, or interpreted those terms differently. While this may reflect the need for greater training for those tasked with enforcing the ordinance, it does not mean the ordinance is unconstitutionally vague.

Appendix B

C. Overbreadth

As noted by the Court of Appeals for the Eleventh Circuit, "the Supreme Court has permitted facial challenges based on overbreadth 'where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker, and in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected.'" *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318, 1331 (11th Cir. 2001) (quoting *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992)). This exception to the usual "unconstitutional-in-every-conceivable-application" rule, however, "has generally been applied only to prior restraints on speech such as before-the-fact permitting and licensing regimes." *Horton*, 272 F.3d at 1331-32. Brevard County's anti-nudity ordinance does not qualify as a permitting or licensing scheme (or otherwise require prior review); rather, the ordinance calls for after-the-fact enforcement. Accordingly, the Plaintiffs' overbreadth challenge does not qualify for the exception to the general rule. *See id.* at 1332.

Even if the exception could validly be applied, the outcome is the same. For a law to be considered facially invalid, it must be "'substantially overbroad, that is, its application would be unconstitutional in a substantial proportion of cases.'" *Id.* (quoting *Ward v. County of Orange*, 217 F.3d 1350,1355, *reh'g and sugg. for reh'g en banc denied*, 234 F.3d 35 (11th Cir. 2000), *cert. denied*, 531 U.S. 1149 (2001)). Invalidating a law based on facial overbreadth "is not, however, a common judicial remedy;" as "strong medicine,"

the doctrine is applied "sparingly and only as a last resort." *Horton*, 272 F.3d at 1332 (citations and quotations omitted).

Applying similar principles in *Café 207*, Judge Hodges rejected an overbreadth challenge to St. Johns County's substantially similar ordinance. Focusing primarily on the question of standing,[11] Judge Hodges determined that even if the St. Johns ordinance was broad enough to encompass protected expression, the ordinance's exemptions would "step in to safeguard the protected speech." 856 F. Supp. at 648. Substantially similar exemptions are included in Brevard County's ordinance. *See* § 6.b & .c. Judge Hodges also noted that the legislative findings set forth in the St. Johns ordinance, clarifying that the measure was not intended to prohibit constitutionally-protected conduct, provided interpretive guidance. *Id.* Similar findings are present in Brevard County's ordinance. *See* § 3.u & .v. Judge Hodges concluded that "in light of the . . . exemptions and judging the ordinance as a whole . . . , there is no real and substantial overbreadth in the measure that cannot await case-by-case limiting construction or, if necessary, partial invalidation."[12] 856 F. Supp. at 649 (footnote omitted).

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11. Judge Hodges determined that the plaintiffs in *Café 207* lacked standing to raise an overbreadth challenge. 856 F. Supp. at 649.

12. Judge Hodges also noted that the St. Johns ordinance contained a severability clause which would "preserv[e] the main thrust of the ordinance in the event of partial invalidity[.]" 856 F. Supp. at 649 n.7. The Brevard County ordinance contains a similar severability provision. *See* § 8.

Application of these principles is fatal to Plaintiffs' overbreadth claim. When judged in relation to the ordinance's "plainly legitimate sweep," protected expression inhibited by the ordinance is insubstantial, and can be remedied "independent of a facial challenge" on a case-by-case basis. *Horton*, 272 F.3d at 1332-33. Accordingly, the Defendants are entitled to summary judgment on Plaintiffs' overbreadth claim.

D. Equal Protection

Plaintiffs contend that by enforcing the ordinance against naturists, but not against commercial adult entertainers, the Sheriff violates the Plaintiffs' right to equal protection. The Court rejects this argument, as well.

Brevard County has chosen to enact a separate ordinance governing adult entertainment establishments, including those in which nude dancers perform. The adult entertainment ordinance is comprehensive. It does not merely regulate nudity in "strip clubs." Rather, it addresses a host of additional subjects associated with a variety of adult entertainment establishments, including sexual activities, licensing, location, advertising, and the admission of, and sales to, minors. *See* Attachment "ORD" to Doc. 45.

The Sheriff has identified factors associated with adult entertainment establishments that distinguish them from more public places, so as to demonstrate that commercial nude dancers and naturists are not similarly-situated. In that regard, the Sheriff states:

Appendix B

> [D]istinguishing characteristics exist that separate private night clubs from a public beach or any other public location including, but not limited to: (a) paying to enter a club vs. free unlimited access to the beach or other public place; (b) the expectation of witnessing nudity at a strip club vs. the surprise of seeing nudity at a public place; (c) the prohibition of minors at a strip club vs. their presence at public places; (d) the obstruction of activity that occurs within the strip clubs (as there are no windows) vs. the exposed activity that occurs at a public place; and (e) the licensing and zoning restrictions applied to strip clubs that do not apply to public places. Put simply, strippers and the plaintiffs are not "similarly situated people."
>
> To illustrate this point, if adult entertainment performers venture outside of their working environment and decide to appear nude at the beach or any other public place in Brevard County, they will be subject to the Ordinance just like everyone else. Conversely, if one of the plaintiffs were to be employed as an adult entertainer in one of the aforementioned establishments, they would not be subject to the Ordinance based on the above referenced reasons. This does not prove that the BCSO doesn't enforce the Ordinance elsewhere in the County, but rather demonstrates that the primary enforcement area is the area where most public nudity and complaints of public nudity occur.

Doc. 98 at 9 (deposition and case citations omitted).

The Court finds these distinctions compelling. It is important to remember that unlike garden-variety public nudity, nude dancing "is expressive conduct that falls within the outer ambit of the First Amendment's protection." *Flanigan's Enterprises, Inc. of Georgia v. Fulton County, Ga.*, 242 F.3d 976, 982 (11th Cir. 2001). Accordingly, the Court rejects Plaintiffs' argument that naturists and commercial nude entertainers are similarly situated. The Court also rejects Plaintiffs' contention that the Sheriffs "unequal enforcement of the Ordinance regarding strip joints vis-a-vis naturists is arbitrary, capricious, and without rational basis." Doc. 73 at 7. The fact that the Sheriff polices exotic dancers through the mechanism of Brevard County's ordinance dedicated to the regulation of adult entertainment, instead of arresting them under the more general anti-nudity ordinance, does not deprive the Plaintiffs of equal protection. In other words, that the Sheriff's deputies enter an adult entertainment establishment with an eye toward enforcing the adult entertainment code, rather than the anti-nudity ordinance, is of no constitutional moment. The unique factors associated with adult entertainment establishments justify regulation of those businesses by means of a separate ordinance. Plaintiffs have not cited any case law addressing the propriety of a dual ordinance scheme such as here presented; instead, they rely on general equal protection precepts. In the absence of authority to the contrary, this Court is unwilling to essentially invalidate the anti-nudity ordinance on the sole basis that it is not enforced against commercial nude dancers who are comprehensively regulated under a separate ordinance. Brevard County has legitimate governmental interests in regulating public nudity and adult entertainment establishments, and the Sheriff has the

obligation to enforce the County's ordinances unless they are "grossly and flagrantly unconstitutional." *Cuesta v. School Bd. of Miami Dade County, Fla.*, 285 F.3d 962, 967 n.5 (11th Cir. 2002) (quoting *Michigan v. DiFillippo*, 443 U.S. 31, 38 (1979)). Brevard County's anti-nudity ordinance is not "grossly and flagrantly unconstitutional;" to the contrary, this Court today determines that it is constitutional. Accordingly, the Sheriff is entitled to summary judgment on Plaintiffs' equal protection claim.[13]

E. Freedom of Religion

Facially, Brevard County's anti-nudity ordinance prohibits public nudity, not religious expression. Nevertheless, Plaintiffs claim that the ordinance's prohibition on nudity in public places, including a "meeting facility utilized by a religious . . . organization," § 4.e., violates their right to free religious exercise. Once again, Plaintiffs rely on general First Amendment principles; they identify no legal authority dealing with nudity in the context of religious practices. Put bluntly, this claim verges on the frivolous. It illustrates the lengths to which Plaintiffs will go in their attempt to invalidate the ordinance.[14]

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13. Given this ruling, it is unnecessary to reach the issues of custom and policy, deliberate indifference and res judicata.

14. Any doubt about whether Plaintiffs and their counsel have lost perspective concerning this case is dispelled by examining the "damages claimed" section of the final pretrial statement. Therein, Marvin Frandsen seeks pain and suffering damages, "[s]ubject to jury determination," resulting from an automobile accident he was

(Cont'd)

Appendix B

It is doubtful that the Plaintiffs even have standing to raise this claim. If they do, they have produced no evidence that any traditional religious organization has actually been deterred from performing any ceremony involving nudity in Brevard County.[15] In a vain attempt to surmount this obstacle, Plaintiffs resort to the Universal Life Church ("ULC").

(Cont'd)

in "while en route to the Titusville law library to research issues surrounding the nudity ordinance." Doc. 121, §VII at 8. Similarly, playwright Tonianne Wyner claims the following "future costs" as damages:

> Plaintiff will have to regain an audience previously "chilled." The effort will take time, money and work. To expedite that effort Plaintiff Wyner would place TV, radio and print ads all over Florida since the audience she acquired traveled from all parts of Florida and beyond. *The total approximate cost would be around $202,513.88. This is calculated on: 6 major newspapers @ $28, 678.98 each (1/4 page ad for 2 weeks); and 6 major TV stations @ $2,999.00 each (2 weeks of multiple 30 second ads); and 25 radio stations @ $500 each.*

Id. at 19 (emphasis supplied). These claimed damages are nothing short of ridiculous. Plaintiffs' counsel are admonished for including these damages elements in the pretrial statement.

15. Dr. Frandsen opined during his deposition that a particular religious ceremony conducted in a Mormon temple might run afoul of the ordinance. *See* Doc. 49 at 107-108. He identified the ceremony as "washing and anointing." Frandsen indicated that although the participant wears a garment loosely covering the participant's front and back, spectators might be able to see the participant's genitals from the side. However, Frandsen testified that this ceremony is performed in a Mormon temple, and there is no temple in Brevard County. *See id.* at 109.

Appendix B

Plaintiffs Frank Cervasio and Tonianne Wyner are ministers in the ULC; Marianne Cervasio and Marvin Frandsen are members of that organization. Apparently, one can become a ULC minister "for life" in "just 10 minutes" over the Internet. *See* Exhibit "G" to Doe. 57.[16] The ULC's doctrinal "requirements" are as follows:

> We believe you, we believe in you, we accept you — we offer our hand to you to share respect, wealth, power and influence in the world through the power of God as you believe — your beliefs count in the ULC — *we ask only that you promote the freedom of religion and do that which is right and it is up to the individual to determine what is right as long as it does not infringe on the rights of others and is within the law.* That is as close to the Golden Rule as one can come without being the Golden Rule.

Id. (emphasis supplied).

No evidence has been presented that the ULC requires or even encourages that a religious ceremony be performed in the nude. Frank Cervasio testified at his deposition that

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16. The ULC's website offers a "*Ministry in a Box* product that includes everything you need to start your ministry[.]" Exhibit "G" to Doc. 57. Among the advantages of becoming a ULC minister: "Did you know that many companies offer discounts to ministers, ministers have a longer life expectancy for insurance carriers, insurance rates are often lower, if you ask - benefits can be yours just for the asking and the showing of your ministerial wallet ID or wall credential." *Id.*

he was not aware of any ULC "teaching" that requires nudity. Doc. 47 at 87. When asked if he recalled "ever reading anything from the Universal Life Church or hearing anything from anyone at the Universal Life Church that would require a particular service or ceremony to be performed in the nude," Frank Cervasio replied: "Not that I recall, no." *Id.*

In a subsequently-filed affidavit, Frank Cervasio states that the ULC has "two main tenets": "the absolute right to freedom of religion" and "to do that which is right," as well as a "corollary tenet . . . not to violate the law." Doc. 95, ¶ 2, at 1. However, he says, the ULC "leaves the modes and methods of religious observance to the discretion of its ministers and practitioners." *Id.* at 1-2. Frank Cervasio further states:

> As part of my ministry, I perform marriages and other religious ceremonies in which I and the participants are in the nude. In my sincere belief, the best and preferred way to exercise my religion is to do so in the nude. In my view, performing and encouraging participating in marriage and other ceremonies in the nude is an important religious practice, and a fundamental rite, which is essential, basic and integral to my role, function, and service as a minister.

Id., ¶ 3, at 2. Frank Cervasio also states that his "fear of further arrest of myself and of my congregation under the Ordinance interferes with the way I would normally conduct my ceremonies." *Id.*, ¶ 5, at 2.

Assuming that the Universal Life Church qualifies as a religion for First Amendment purposes, this Court is unwilling to invalidate Brevard County's anti-nudity ordinance based on the Plaintiffs' personal belief that nudity is "the best and preferred way" to practice that religion. Given the ULC's extremely broad and vague doctrinal "requirements," one could argue that virtually anything qualifies as an aspect of that religion. If this were true, each ULC member would have the ability to elevate his or her personal belief structure into a "religion" within the meaning of the First Amendment. This Court will not countenance such an absurd result. Legitimizing such a concept could cripple the government's ability to administer activities traditionally subject to government regulation, e.g., taxation, zoning, public health and criminal law. Moreover, it appears that the Plaintiffs' position, that nude religious practices are authorized by the ULC, is directly contrary to the ULC's requirement that its members not violate the law. Finally, even if § 5 of the ordinance does encompass nudity during the performance of some religious ceremony protected by the First Amendment, such nudity would be exempted from prosecution under the exceptions contained in § 6.b. & .c. Accordingly, the Defendants are entitled to summary judgment on Plaintiffs' freedom of religion claim.

VI. CONCLUSION

At bottom, the Plaintiffs' feud with the Defendants over Brevard County's anti-nudity ordinance is a political problem, rather than a matter of constitutional concern. Through its duly-elected commissioners, the County has chosen to ban public nudity unprotected by the Constitution.

If Plaintiffs wish to reverse that course, they must resort to the political process. If they are unsuccessful, they may have to face the realization that under our form of government, so long as the Constitution is not violated, the desires of the minority sometimes must bend to the will of the majority.

Based on the foregoing, it is ORDERED as follows:

1. Sheriff Williams' Motion for Summary Judgment (Doc. 45), filed January 4, 2002, is GRANTED.

2. Brevard County's Motion for Summary Judgment (Doc. 57), filed January 4, 2002, is GRANTED.

3. Plaintiffs' Dispositive Motion for Partial Summary Judgment Against Sheriff Williams (Doc. 72), filed January 8, 2002, is DENIED.

4. Plaintiffs' Dispositive Motion for Partial Summary Judgment Against Brevard County (Doc. 75), filed January 8, 2002, is DENIED.

5. The Defendants' motions to strike (Docs. 65, 66, 67, 68, 69 & 97) various "expert" witnesses listed by Plaintiffs and their reports are DENIED. Given the foregoing rulings, particularly concerning Plaintiffs' challenges to the findings underpinning the ordinance, the Court has not considered for summary judgment purposes the evidence addressed in these motions. Nevertheless, these materials will not be stricken; they will remain in the court file for purposes of appellate review, if necessary. The Court does not reach the question of whether the Plaintiffs' witnesses qualify as

experts or whether their opinions are reliable. *See* Fed. R. Evid. 702.

6. Brevard County's Motion to Strike Plaintiffs' Polling Data (Doc. 99), filed February 5, 2002, is DENIED. Again, the Court has not considered the polling data in light of its rulings concerning the findings underlying the ordinance. However, this evidence, too, should remain in the record. The Court does not reach the question of whether the polling data is scientific and reliable.

7. The Defendants' Motion to Strike Plaintiffs' Statement of Facts, etc. and Memorandum of Law, etc. (Doc. 101), filed February 5, 2002, is DENIED.

8. Plaintiffs' Unopposed Motion to File Amended Defendants' Exhibit Lists (Doc. 123), filed April 4, 2002, is moot.

9. As Plaintiffs note, the Defendants filed a number of motions without complying with Local Rule 3.01(g). The Defendants attempted to remedy that lapse by filing a certificate of compliance with Rule 3.01 (g) long after the Plaintiffs pointed out the problem. *See* Doc. 112. However, the Local Rule requires that the conference of counsel occur prior to motion filing, and that the certificate of attorney conference accompany the motion. In the future, Defendants' counsel shall comply with these requirements.

10. The Clerk shall enter a final judgment providing that the Plaintiffs, Marvin V. Frandsen, Jan L. Frandsen, Bryan Morris, Frank J. Cervasio, Marianne Cervasio, Dian Hardison

and Tonianne Wyner, shall take nothing on their claims against the Defendants, Brevard County, Florida, and Brevard County Sheriff Phil Williams, and further providing that the Defendants shall recover their costs of action.

11. The Clerk shall close this case.

DONE and **ORDERED** in Orlando, Florida this 3rd day of May, 2002.

s/ Anne C. Conway
ANNE C. CONWAY
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC FILED OCTOBER 30, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-13293-HH

MARVIN V. FRANDSEN,
JAN L. FRANDSEN,
BRYAN MORRIS,
FRANK J. CERVASIO,
MARIANNE CERVASIO,
DIAN HARDISON,
TONIANNE WYNER,

Plaintiffs-Appellants

versus

BREVARD COUNTY, FLORIDA,
PHIL WILLIAMS,
Brevard County Sheriff,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

Appendix C

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __F.2d __).

Before: EDMONDSON, Chief Judge, DUBINA and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ J.L. Edmondson
CHIEF JUDGE

APPENDIX D — BREVARD COUNTY ORDINANCE 95-21

BREVARD COUNTY ORDINANCE 95-21

AN ORDINANCE PROHIBITING PUBLIC NUDITY IN BREVARD COUNTY, FLORIDA; DESIGNATING A TITLE; EXPRESSING THE INTENT; SETTING FORTH FINDINGS; PROVIDING DEFINITIONS; CREATING EXEMPTIONS; PROVIDING FOR AN AREA EMBRACED; PROVIDING FOR PENALTIES; PROVIDING FOR SEVERABILITY; AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA:

Section 1. *Title.* This ordinance shall be known as the "Brevard County Public Nudity Ordinance."

Section 2. *Intent.* It is the intent of the Board of County Commissioners, in enacting this ordinance, to prohibit the conduct of being nude in public places for the purpose of protecting societal order and morality and suppressing the adverse secondary effects that public nudity generates, as more specifically described in the findings. It is the intent of this ordinance to protect and preserve the health, safety, and welfare of the people of Brevard County by prohibiting any person from knowingly or intentionally appearing nude in a public place, or knowingly or intentionally causing or permitting another person to appear nude in a public place, within the municipalities and unincorporated areas of Brevard County embraced by this ordinance, subject to certain exceptions.

Appendix D

Section 3. *Findings.*

The Board of County Commissioners finds and determines as follows:

a. since the beginning of civilization, appearing nude in a public place which is not a public place provided or set apart for nudity has been considered improper (see Moffett v. State, 340 So.2d 1155,1156, n.3 [Fla. 1977]; and

b. appearing nude in a public place which was not a public place provided or set apart for nudity was a criminal offense at common law and was considered an act malum in se (wrong in itself); and

c. appearing nude in a public place which is not a public place provided or set apart for nudity is engaging in conduct which often serves to impose such person's nudity on others who did not seek it out, who are not able to reasonably avoid observing it, and who may be offended or distressed thereby and

d. there is a location in Brevard County, specifically the extreme north end of Playalinda Beach (the area north of parking area #13), which has historically been frequented by nude sunbathers, and

e efforts by the State and Federal governments to apply Florida criminal statutes have been rejected by the courts since, under certain applicable criminal laws, nudity alone cannot be prosecuted without proof of lewd and lascivious conduct, and

f. since the rulings of the courts on the non-enforceability of criminal statutes against persons merely appearing nude on Playalinda Beach, people have begun appearing nude on other portions of the beach which have not been historically used by nude sunbathers, and

g. since the above referenced rulings, there has been a documented increase in the number of complaints about persons engaged in open displays of sexual activity as well as lewd and lascivious conduct on all portions of Playalinda Beach; and

h. since the above referenced rulings, there has been a documented increase in the number of complaints about persons flaunting their nudity in front of persons, including children, who chose not to appear nude in public places, and

i. the Board finds that appearing nude in a public place, including a beach area such as Playalinda, which is not a public place provided or set apart for nudity is still subject to general disapproval by the people of Brevard County; and

j. nude sunbathing is not constitutionally protected [South Florida Free Beaches v. City of Miami]; and

k. the appearance of persons in the nude in places which are not public places provided or set in public apart for nudity has been found, by other communities in Florida, to have generally increased incidents of

prostitution, sexual assaults and batteries; attracted other criminal activity to the community; encouraged degradation of women and facilitated other activities which break down societal family structures and values; and

l. without regulation, appearing nude in a public place which is not a public place provided or set apart for nudity constitutes conduct which adversely affects the health, safety and welfare of members of the public who chose not to appear nude in public places; and

m. Brevard County is a family oriented area; and

n. Brevard County beaches and northern Brevard County is an area that is known for and whose economy is largely dependent upon tourists and family oriented attractions, such as the Kennedy Space Center, and

o. the Board finds from correspondence that Board members have received, that nudity on public beaches, in particular playalinda beach, has caused some tourists to express their intent not to frequent Brevard County beaches, and

p. regulation of public nudity will protect and preserve the public health, safety, and welfare of the people of Brevard County by restricting, to the fullest extent allowed by the United States Constitution and Florida

Constitution, the act of being nude to non-public places or public places provided or set aside for nudity; and

q. non-regulation of persons appearing nude in public places which are not public places provided or set apart for nudity within the Brevard County would encourage entities and persons to exploit nudity for profit or commercial gain and to advertise outside of Brevard County and the State of Florida the availability of and opportunity for nudity in public places which are not places provided or set apart for nudity within Brevard County, and

r. non-regulation of persons appearing nude in public places which are not public places provided or set apart for nudity would encourage the influx into Brevard County of persons seeking to observe and/or participate in such nudity, and to participate in the secondary effects of such nudity, including disorderly, harmful, illegal and open sexual activity that is associated therewith, thereby inhibiting open access to public facilities and causing potential harm to the health, safety and welfare of Brevard County residents and other persons who choose not to appear nude in public places; and

s. the prohibitions contained in this ordinance are the most reasonable and minimum restrictions required so as to regulate the conduct of public nudity which the Board finds to be conduct adverse to public order

and morality within Brevard County, when such conduct occurs in a public place which is not a public place provided or set apart for nudity; and

t. states may regulate the conduct of appearing nude in public places which are not public places provided or set apart for nudity (see Barnes v. Glen Theatre. Inc. 111 S.Ct 2456,115 L.Ed.2d 504 (1991); and

u. the exemptions contained in this ordinance provide adequate protection to persons who, without such exemptions, might be prevented or discouraged by this ordinance from exercising constitutionally protected rights; and

v. this ordinance regulates conduct, not speech.

Section 4. *Definitions*.

a. "Entity" means any proprietorship, partnership, corporation, association, business trust, joint venture, joint-stock company or other for profit and/or not for profit organization.

b. "Nude" means to openly display or expose,

1) the human male or female genitals or pubic area with less than a fully opaque covering; or

2) any portion of the anal cleft or cleavage of the male or female buttocks. Attire which is insufficient to comply with this requirement

includes, but is not limited to, G-Strings, T-Back bathing suits, thong bikinis, dental floss or any other clothing or covering that does not completely and opaquely cover the anal cleft or cleavage of the male or female buttocks; or

3) the portion of the human female breast directly or laterally below a point immediately above the top of the areola with less than a fully opaque covering. This definition shall include the entire lower portion of the human female breast, including the areola and nipple, but shall not include any portion of the cleavage of the human female breast exhibited by a dress, blouse, shirt leotard, bathing suit or other clothing, provided the areola is not exposed; or

4) human male genitals in a discernably turgid state, even if completely and opaquely covered.

For purposes of this definition, body paint, body dye, a tattoo, latex, or any similar substances shall not be considered an opaque covering.

c. "Person" means any human being at least ten (10) Years of age.

d "Public place provided or set apart for nudity" means an enclosed public restroom; an enclosed functional shower or locker room facility; an enclosed sauna; a motel room or hotel room designed and intended or sleeping accommodations; or at the enclosed or

isolated location of a bona fide private club whose membership as a whole engages in social nudism or naturism (a nudist resort or camp); and any similar public places in which nudity is necessarily and customarily expected outside of the home (example: doctor's office or hospital) or where a nude person would have a constitutionally protected expectation of privacy. The term also includes any area or land:

1) which is under the ownership or control of the Federal or State government and

2) which the Federal or State government has specifically and expressly designated, with signage or otherwise, as a location where nude sunbathing is permitted. Signs which only warn of possible encounters with nude sunbathers, or any similarly worded sign, shall not be deemed to constitute a specific or express designation of an area for nude sunbathing.

e. "Public Place" means any location open to the common and general use, participation, or enjoyment of the public where the public is present or likely to be present, or any location where the public is invited and is free to go upon special or implied invitation, or any location where a person may reasonably be expected to be observed by the public. A public place includes, but is not limited to, a street, sidewalk, park, beach, business or commercial establishment (whether for profit or not for profit and whether open to the public at large or where entrance is limited by

a cover charge or membership requirement), bottle club, hotel, motel, restaurant, night club, country club, cabaret, or meeting facility utilized by a religious, social, fraternal or similar organization.

Section 5. *Public Nudity*. Subject to the exemptions set forth in Section 6 below, it shall be unlawful for any person to knowingly or intentionally:

a. appear nude in a public place; or

b. cause or permit another person to appear nude in a public place; or

c. sunbathe nude in a public place; or

d. appear nude in a public place in such a manner as to be in violation of §877.03, Florida Statutes; or

e. appear nude in a public place in such a manner as to be in violation of the common law of England as adopted by §775.01, Florida Statutes.

Section 6. *Exemptions*. The offense of public nudity contrary to Section 5 above shall not be deemed to have occurred in any of the following instances:

a. when a person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose of performing a legal function that is customarily intended to be performed

within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity; or

b. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example, Barnes v. Glen Theatre Inc __ U.S. 111 S.Ct. 2456,115 L.Ed.2d 504 [1991]; and Hoffman v. Carson, 250 So. 2d 891 [Fla. 1971]); or

c. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it is otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions; or

d. where a person appears nude in any area which has been designated, by the Federal or State government as a public place provided or set apart for nudity; or

e. when a mother is breast-feeding her baby; or

f. where a person appears nude in any area which is owned or controlled by the Federal or State

government and it is judicially or legislatively determined that the County has no jurisdiction or authority to exercise its police power in that area.

Section 7. *Violation of Section 5/Penalty.* Any person who violates Section 5 above shall be prosecuted in the same manner as misdemeanors are prosecuted. Upon conviction, a violator shall be punished by a fine not to exceed $500 or by imprisonment in the county jail not to exceed 60 days, or by both such fine and imprisonment. This enforcement procedure and penalty for violations of this ordinance is adopted under the express authority of sec. 125.69(1) Florida Statutes.

Section 8. *Severability.* If any section, subsection, sentence, clause, phrase, word or provision of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such invalid unconstitutional portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions of this ordinance, provided the remaining portions effectuate purpose and intent of this ordinance.

Section 9. *Area Embraced.* This ordinance shall be effective in all municipalities and in the unincorporated area of Brevard County.

Section 10. *Effective Date.* This ordinance shall take effect upon the date of receipt of official acknowledgement from the office of the Secretary of State of the State of Florida, that said ordinance has been filed with that office.

Appendix D

DONE, ORDERED AND ADOPTED in Regular Session, this *18th* day of *May*, 1995.

ATTEST: BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA

(2)

No. 03-1109

Supreme Court, U.S.
FILED
APR 2 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MARVIN V. FRANDSEN, JAN L. FRANDSEN, BRYAN MORRIS, FRANK J. CERVASIO, MARIANNE CERVASIO, DIAN HARDISON, and TONIANNE WYNER,

Petitioners,

v.

BREVARD COUNTY, FLORIDA and BREVARD COUNTY SHERIFF PHIL WILLIAMS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF NECESSARY FACTS	1
INTRODUCTION	2
ARGUMENT	2
I. THE ELEVENTH CIRCUIT'S DECISION IS SUPPORTED BY, RATHER THAN IN CONFLICT WITH, THIS COURT'S DECISIONS AND NO DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS CAN BE SHOWN	2
II. THE ELEVENTH CIRCUIT CORRECTLY FOUND THAT THE ORDINANCE DID NOT VIOLATE PETITIONERS' FREEDOM OF RELIGION RIGHTS IN ACCORDANCE WITH THIS COURT'S PRECEDENT	6
III. IN ACCORDANCE WITH THE OPINIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL, THE ELEVENTH CIRCUIT CORRECTLY FOUND THAT THE SUBJECT ORDINANCE IS CONTENT NEUTRAL AS IT REGULATES THE CONDUCT OF PUBLIC NUDITY AND IS THUS SUBJECT TO THE INTERMEDIATE SCRUTINY TEST OF *UNITED STATES V. O'BRIEN*, 391 U.S. 367 (1968)	9
IV. THE ELEVENTH CIRCUIT CORRECTLY FOUND NO INFIRMITY IN THE FINDINGS SUPPORTING THE ADOPTION OF THE ORDINANCE AND NO UNJUST JUDICIAL PROCEDURES CAN BE SHOWN	12
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 6, 7

City of Ladue v. Gilleon, 512 U.S. 43 (1994) 11

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) 12, 13

Cohen v. California, 403 U.S. 15 (1971) 10

Erznozik v. City of Jacksonville, 422 U.S. 205 (1981) 10

Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999) 7

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) 4

Hill v. Colorado, 530 U.S. 703 (2000) 3, 4, 9

Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, 515 U.S. 557 (1995) 10

Kolender v. Lawson, 461 U.S. 352 (1983) 3, 4

Levitan v. Ashcroft, 281 F.3d 1313 (D.C. Cir. 2002) 7, 8

Reeves v. McConn, 631 F.2d 377 (5th Cir. 1980) 10

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) 12, 13

Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002) 7

Tunick v. Safir, 228 F.2d 135 (2d Cir. 2000) 10

United States v. O'Brien, 391 U.S. 367 (1968) 9, 11, 12

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 9

TABLE OF AUTHORITIES – Continued

Page

Virginia v. Hicks, 123 S. Ct. 2191 (2003) 2, 3

Wyner v. Struhs, 254 F.Supp.2d 1297 (S.D. Fla. 2003) 10, 11

STATEMENT OF NECESSARY FACTS

Pursuant to Rule 15(2) of the Supreme Court Rules, Respondent, Brevard County, Florida (the "County") addresses the following perceived misstatements and omissions made by Petitioners.

Petitioners are naturists who seek to promote the benefits of non-sexual nudity as part of recreation including nude sunbathing on Playalinda Beach. R.1. The Brevard County Board of County Commissioners enacted Brevard County Ordinance 95-21 ("the Ordinance") due to an increased number of complaints regarding people "engaged in open displays of sexual activity as well as lewd and lascivious conduct on all portions of Playalinda Beach." Petitioners' Appendix at p. 50a. In enacting the Ordinance, the County relied on reported instances of public masturbation, sodomy, stalking, distribution of pornographic material, sexual intercourse, lewd and lascivious acts in front of children, oral sex, propositioning sexual acts from females, public urination and defecation, and harassment by others by nude beachgoers on Playalinda Beach (R.57-Exhibit B).

The Ordinance prohibits the conduct of being nude in a public place. Petitioners' Appendix at p. 48a-59a. However, the Ordinance provides various exceptions including exemptions for constitutionally protected speech. Petitioners' Appendix at p. 57a.

Petitioners' attempt to side-step enforcement of the Ordinance and the fact that there is no constitutional right to sunbathe or associate in the nude, by claiming that they have a constitutional right to violate a law in order to protest it. Various Petitioners have been cited or arrested for violating the Ordinance. In every instance,

however, the Petitioner was completely nude at the time of the arrest or citation. Petition at pp. 2-3.

INTRODUCTION

Petitioners have failed to identify any decision of this Court or of another United States Court of Appeals in conflict with the instant case. Petitioners have merely reargued the merits of their claims and have not set forth an adequate basis for exercise of this Court's jurisdiction. Further, a review of the cases cited by Petitioners demonstrates the Eleventh Circuit properly affirmed the summary judgment in favor of the County, in accordance with this Court's established precedent.

Because arguments four and five are not directed at this Respondent, no response has been provided.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S DECISION IS SUPPORTED BY, RATHER THAN IN CONFLICT WITH, THIS COURT'S DECISIONS AND NO DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS CAN BE SHOWN.

The cases cited by Petitioners demonstrate that the Eleventh Circuit Court of Appeals' (hereafter "Eleventh Circuit") decision is actually supported by, rather than in conflict with, the rulings of this Court. Petitioners first cite to *Virginia v. Hicks*, 123 S. Ct. 2191 (2003), claiming that this opinion required the Eleventh Circuit to invalidate all enforcement of the Ordinance due to the Ordinance's

overbreadth. Petition at p. 9. However, as noted by this Court in *Virginia*, "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Virginia*, 123 S. Ct. at 2199 (parenthesis in original). Further, "[t]he overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia*, 123 S. Ct. at 2198.

In this case, the Ordinance is intended "to prohibit the conduct of being nude in public places," and is not specifically addressed to speech or to conduct necessarily associated with speech. Petitioners' Appendix at p. 48a. Petitioners have pointed to a limited amount of purportedly protected expression that they claim is affected by the Ordinance, but have not demonstrated that the law punishes a substantial amount of protected free speech as judged in relation to the Ordinance's plainly legitimate sweep – which consists of prohibiting the conduct of appearing in public in the nude. Appendix at p. 48a. Thus, pursuant to the dictates of *Virginia,* the Eleventh Circuit could not properly invalidate enforcement of the Ordinance. *Virginia*, 123 S. Ct. at 2199. Therefore, the Eleventh Circuit's decision is in accord with *Virginia* and no conflict has been shown.

Nor does conflict exist with *Hill v. Colorado*, 530 U.S. 703 (2000) or *Kolender v. Lawson*, 461 U.S. 352 (1983). Petitioners correctly point to these cases in support of the contention that a statute can be impermissibly vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or if it authorizes or encourages arbitrary and discriminatory

enforcement. Petition at p. 9. However, as noted by this Court in *Hill*:

> [T]here is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question, because we are condemned to the use of words, we can never expect mathematical certainty from our language. [S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications.

Hill, 530 U.S. at 733. Significantly, the words now pointed to by Petitioners as vague, including "discernibly turgid" "pubic area", and "opaque" do not come into play in this case as Petitioners were completely nude on Playalinda Beach when cited for violating Ordinance 95-21. Petitioners' Appendix at p. 21. Because "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute," the Eleventh Circuit's finding that the subject Ordinance is not vague is supported by *Hill* and *Kolender* and no conflict exists.

Likewise, no conflict exists with *Gentile v. State Bar of Nevada*, 501 U.S. 1030, (1991). Petitioners note that in *Gentile* this Court recognized that a citizen who was found in violation of a rule after studying it and making a conscious effort at compliance "demonstrates that [the rule] creates a trap for the wary as well as the unwary." Petition at p. 10. However, in that case, the rule in question was directed at punishing "pure speech in the political forum," and prevented attorneys from making extra judicial statements regarding particular cases. *Id.* at 1034. Because *Gentile* involved a materially different rule and

applied that rule to materially different facts, the case is both legally and factually distinguishable and no conflict can exist.

Finally, Petitioners offer absolutely no support for their claim that "the Court of Appeals effectively sanctioned a departure from the accepted and usual course of summary judgment proceedings by a lower court as to call for an exercise of this Court's supervisory power," other than their disagreement with the Eleventh Circuit's decision. Petition at p. 8. Petitioners seem to be arguing that because some of the terms of the Ordinance could purportedly be called into question in the hypothetical situations raised by Petitioners' counsel, the Eleventh Circuit's decision finding that the Ordinance was not vague somehow departed from the accepted course of summary judgment proceedings. However, as set forth above, this Court's precedent does not require such a finding and in fact supports the District Court's and Eleventh Circuit's decisions in this matter.

Further, Petitioners cannot demonstrate that a departure from the accepted and usual course of summary judgment proceedings occurred. In this instance, following extensive discovery taken by both parties, competing motions for summary judgment were filed. Petitioners' Appendix at p. 8a. Thus, Petitioners obviously believed that no issue of material fact existed and this case was ripe for entry of summary judgment. However, having disagreed with the District Court's and then Eleventh Circuit's decisions, the Petitioners now contend that the entry of summary judgment *against them* was a departure from the usual course of summary judgment proceedings, requiring an exercise of this Court's supervisory power. However, because the Court properly considered all the

record evidence and memoranda of the parties prior to ruling, no departure can be found.

Thus, Petitioners have failed to demonstrate any basis for the exercise of this Court's jurisdiction. Rather, the case law and facts pointed to by Petitioners demonstrate that the District Court and then Eleventh Circuit properly granted and then affirmed summary judgment in favor of the County.

II. THE ELEVENTH CIRCUIT CORRECTLY FOUND THAT THE ORDINANCE DID NOT VIOLATE PETITIONERS' FREEDOM OF RELIGION RIGHTS IN ACCORDANCE WITH THIS COURT'S PRECEDENT.

The Eleventh Circuit correctly followed this Court's precedent when it found that the Ordinance did not violate Petitioners' freedom of religion rights. The instant ordinance is not directed at religious practices and provides exemptions for otherwise constitutionally protected conduct.

Petitioners first point to *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), in support of their contention that the Court of Appeals erred by failing to extend an exemption to Petitioners' alleged religious conduct. Petition at p. 11. However, the ordinance at issue in *Church of the Lukumi Babalu Aye, Inc.*, is legally and factually distinguishable from the instant Ordinance. Further, a review of this Court's analysis in *Church of the Lukumi Babalu Aye, Inc.*, demonstrates that the Eleventh Circuit reached the proper conclusion in the instant case.

As an initial matter, the ordinance at issue in *Church of the Lukumi Babalu Aye, Inc.* was specifically directed to the religious practices of a particular religion, which required that the law be justified by a compelling governmental interest. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 524, 531-532. However, the Court noted that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has an incidental effect of burdening a particular religious practice." *Id.* at 531. Thus, because the Ordinance in the instance case is neutral and of general applicability, it need not be justified by a compelling governmental interest.[1]

Further, even if it were somehow found that the Ordinance was directed at religious practices, requiring the County to show a compelling reason to refuse to extend the Ordinance's individualized exemptions to Petitioners for their alleged nude religious rituals, the Eleventh Circuit correctly found that the Ordinance did not violate Petitioners' freedom of religion because "the Ordinance itself exempts from its scope constitutionally protected activity." Petitioners' Appendix at p. 6a, n. 4.

In addition to *Church of the Lukumi Babalu Aye, Inc.*, Petitioners point to *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 171 (3d Cir. 2002) and *Levitan v. Ashcroft*, 281 F.3d 1313 (D.C. Cir. 2002), in support of their contention that the Eleventh Circuit erred by stating that

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[1] Similarly, Petitioners' argument that *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), requires that the County provide compelling reasons for refusing to exempt Petitioners' alleged nude religious conduct also fails.

the nudity must be a mandatory part of Petitioners' religion before it could be found to be protected conduct. Petition at p. 12. However, the District Court did *not* hold that the nudity had to be required by Petitioners' religion, as affirmed by the Eleventh Circuit, but noted that "no evidence has been presented that [the Universal Life Church] requires *or even encourages* that a religious ceremony be performed in the nude." Petitioners' Appendix at p. 40a. The District Court further noted that Petitioners' position, that nude religious practices are authorized by the Universal Life Church, may be directly contrary to the Universal Life Church's teachings. *Id.* at p. 42a.

Further, the cases cited to by Petitioners support rather than conflict with the Eleventh Circuit's decision. In *Levitan v. Ashcroft*, 281 F.3d 1313, 1321 (D.C. Cir. 2002), the court noted that "it is sometimes the case that litigants can make no credible showing that the effected practice is either central or important in their religious scheme. In such cases, the *de minimis* burden imposed by the challenged law is not constitutionally cognizable." *Id.*

In this case, the District Court found no credible evidence that nudity was important in Petitioners' religious scheme and concluded that it may in fact be contrary to the tenants of the Universal Life Church. Petitioners' Appendix at p. 40a-41a. Further, as set forth above, the Eleventh Circuit did not even address the issue of whether or not the nudity had to be a mandatory part of Petitioners' religion, finding the fact that the Ordinance provides an exemption for constitutionally protected activity sufficient to reject Petitioners' freedom of religion claims. Petitioners' Appendix at p. 6a, n. 4. Thus, the instant decision is in accordance with the cases

cited to by Petitioners and no basis exists for the exercise of this Court's jurisdiction.

III. IN ACCORDANCE WITH THE OPINIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL, THE ELEVENTH CIRCUIT CORRECTLY FOUND THAT THE SUBJECT ORDINANCE IS CONTENT-NEUTRAL AS IT REGULATES THE CONDUCT OF PUBLIC NUDITY AND IS THUS SUBJECT TO THE INTERMEDIATE SCRUTINY TEST OF *UNITED STATES V. O'BRIEN*, 391 U.S. 367 (1968)

Petitioners have utterly failed to identify any opinion of this Court, or any other court for that matter, which holds that strict scrutiny applies when reviewing a law that regulates conduct. It is undisputed that strict scrutiny applies when a law is a content based law that regulates protected speech. However, as demonstrated by the plain language of the Ordinance, the Ordinance regulates the conduct of public nudity, not speech.

Petitioners point to no case which provides that strict scrutiny would apply in this instance. All of the cases relied on by Petitioners are factually and legally distinguishable and do not support Petitioners' claims. *See, e.g., Hill v. Colorado*, 530 U.S. 703 (2000) (court examined whether a content-neutral statute regulating speech-related conduct within 100 feet of the entrance to any health care facility was a valid time, place and manner restriction); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (court applied strict scrutiny to Section 505 of the Telecommunications Act of 1996, finding law was content based because it was primarily dedicated to the content of particular, sexually-oriented programming but was unconcerned

with other speech); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1981) (finding ordinance suppressing films containing nudity which were visible from a public place to be content based, but noting that scenes from movies or pictures in books were distinguishable from the kind of nudity traditionally subject to indecent exposure laws and would not suggest that the First Amendment permits nudity in public places); *Cohen v. California*, 403 U.S. 15 (1971) (finding that the conviction of a man based upon his entrance into a courthouse corridor wearing a jacket displaying the phrase "fuck the draft" was based solely on the man's speech and not upon any separately identifiable conduct); *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995) (finding a parade to be protected speech and finding law requiring private parade sponsor to convey particular message be unconstitutional); *Reeves v. McConn*, 631 F.2d 377 (5th Cir. 1980) (reviewing time, place and manner restrictions with respect to political and educational speeches using sound amplification equipment); *Tunick v. Safir*, 228 F.2d 135 (2d Cir. 2000) (affirming injunction preventing city from interfering with nude photo shoot noting that photographer had clear likelihood of success on the merits of substantive claim because photo shoot likely fell with exemption to anti-nudity ordinance as photo shoot constituted a "play, exhibition, show or entertainment" within the meaning of the exception).

Interestingly, Petitioners also point to *Wyner v. Struhs*, 254 F.Supp.2d 1297 (S.D. Fla. 2003), in support of their proposition that strict scrutiny should apply to the instant Ordinance. Petition at p. 15. However, in that case, which also involved one of the Petitioners in this case, the

court clearly held that the *O'Brien* test applies to determine the validity of a restriction placed on the assembly of a nude peace sign. *Id.* at 1302. Thus, once again, the cases relied on by Petitioners actually support rather than conflict with the District Court's and Eleventh Circuit's application of the *O'Brien* test to the instant Ordinance.

Next, Petitioners erroneously state that the Ordinance's findings and exemptions regulate only speech that has the content of expressive nudity, demonstrating the Ordinance's intent to regulate speech. Petition at pp. 15-16. Petitioners are merely rearguing the merits of their position that was considered and rejected by the District Court and the Eleventh Circuit. However, even considering the merits of Petitioners' claims, it is clear that the Ordinance regulates the conduct of being nude. Petitioners again attempt to equate the simple conduct of being nude with protected speech. Pointing to *City of Ladue v. Gilleon*, 512 U.S. 43 (1994), Petitioners argue that the Ordinance's exemptions are nothing more than a content based regulation of speech. Petitioners' Brief at p. 17. However, in *City of Ladue*, the ordinance at issue regulated the content of signs displayed in yards, providing exemptions to signs that conveyed a particular message. *City of Ladue*, 512 U.S. at 45. In this instance, the subject Ordinance provides exemptions for the *conduct* of being nude in various circumstances such as when a mother is breast-feeding her baby. Appendix at p. 57a. Further, the fact that constitutionally protected nudity is exempted from the enforcement of the Ordinance does not transform the Ordinance into a content-based regulation of speech.

Petitioners have pointed to no decision of this Court or any court which holds that strict scrutiny applies to a law

regulating the conduct of appearing nude in public. Further, under the cases cited to by Petitioners, the District Court and the Eleventh Circuit correctly applied the test set forth by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968), and no conflict exists.

IV. THE ELEVENTH CIRCUIT CORRECTLY FOUND NO INFIRMITY IN THE FINDINGS SUPPORTING THE ADOPTION OF THE ORDINANCE AND NO UNJUST JUDICIAL PROCEDURES CAN BE SHOWN.

Once again Petitioners point to no case in conflict with the Eleventh Circuit's decision and merely reargue the merits of their case in challenging the findings the County relied on in support of the Ordinance. Petition at pp. 18-19. Petitioners ostensibly point to *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), in support of their contention that the Ordinance's findings are without adequate evidentiary basis. *Id.* However, regardless of the underlying facts relied upon in support of the regulations enacted in those cases, in this instance, the County relied on reported instances of public masturbation, sodomy, stalking, distribution of pornographic material, sexual intercourse, lewd and lascivious acts in front of children, oral sex, propositioning sexual acts from females, public urination and defecation, and harassment of others by nude beach goers on Playalinda Beach in enacting the Ordinance. (R.57-Exhibit B).

The County noted in its findings that after various court rulings regarding the non-enforceability of criminal statutes against persons merely appearing nude on Playalinda Beach, there had been an increased number of

complaints regarding people "engaged in open displays of sexual activity as well as lewd and lascivious conduct on all portions of Playalinda Beach." Petitioners' Appendix at p. 50a. The District Court noted that "the minutes of the Board of Commissioner's meetings and other evidence considered by the Board (such as police reports, citizen complaints, and findings of other Florida communities) constitute, as a matter of law, a sufficient factual basis for the Board's findings, including those pertaining to the negative secondary effects. Petitioners' Appendix at p. 27a. The Eleventh Circuit properly affirmed this holding, noting that there was no infirmity in the findings supporting the adoption of the Ordinance. *Id.* at p. 6a. Because the findings made by the County in enacting the instant Ordinance are unique to Brevard County and unrelated to any findings in *Schad* and *Alameda Books, Inc.*, no conflict can exist with these cases.

Finally, the Eleventh Circuit's correct interpretation and application of this Court's precedence does not equate to the sanctioning of "unjust judicial procedures" simply because Petitioners disagree with the ruling. Therefore, Petitioners have failed to demonstrate any basis for this Court to accept jurisdiction or any error in the Eleventh Circuit's decision which would warrant review by this Court.

CONCLUSION

Based on the foregoing, Respondent, Brevard County, Florida respectfully requests that this Court deny certiorari and refuse to accept jurisdiction of this matter.

Respectfully submitted,

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(3)

Supreme Court, U.S.
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No. 03-1109

IN THE

Supreme Court of the United States

MARVIN FRANDSEN, JAN L. FRANDSEN, BRYAN MORRIS, FRANK J. CERVASIO, MARIANNE CERVASIO, DIAN HARDISON, and TONIANNE WYNER,

Petitioners,

v.

BREVARD COUNTY, FLORIDA, and BREVARD COUNTY SHERIFF PHIL WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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Petitioners file this Supplemental Brief regarding a new case that was not available at the time of the Petitioners' last filing:

THE ELEVENTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH A RECENT DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IN WHICH THE SIXTH CIRCUIT FOUND DE FACTO CONTENT DISCRIMINATION IN AN ANALOGOUS ORDINANCE PURPORTING TO BE NEUTRAL REGARDING CONTENT.

The Sixth Circuit's decision in *Chabad of Southern Ohio v. City of Cincinnati*, 2004 WL 716870 (6th Cir. Apr. 5, 2004), affirmed the issuance of a preliminary injunction against a local government on the basis that the ordinance at issue, although purporting to be a content-neutral law, was actually based on the content of speech and expression because, *inter alia*, the ordinance's stated rationale was to ensure that the speech and expression at issue "appeals to the widest of audiences." 2004 WL 716870 at *5. The Sixth Circuit continued:

> The district court reasoned that "[b]y excluding from the public discourse on Fountain Square speech which would not appeal to 'the widest of audiences,' the City wishes to eliminate speech which might be controversial or offensive to those visiting downtown Cincinnati."

Id. (citation omitted). The ordinance at issue in *Chabad* is analogous to the Brevard County Ordinance in the instant case because Brevard County's stated rationale is to censor expressive nudity as shown by the Ordinance's Findings: "[A]ppearing nude . . . often serves to impose such person's nudity on others who did not seek it out, who are not able to reasonably avoid observing it, and who may be offended or distressed thereby. . . ." 95-21(3)(C). (*See, e.g.*, R84-46-48,92-96, Def. Ex. 3 (County

Commission Meeting Minutes of 5/4/95 and 5/18/95).) The Ordinance's intent to regulate the content of speech is also implicit in its stated intent not to permit conveyance of a message that might be construed by some people that Brevard County is against conservative "family values" and that might deter people from visiting the Kennedy Space Center. *See* Ord. 95-21(3)(M-N). The Ordinance regulates the content of speech because it forbids people "to exploit nudity for profit or commercial gain and to advertise outside of Brevard County and the State of Florida the availability of an opportunity for nudity in public places which are not places provided or set apart for nudity within Brevard County. . . ." *Id.* at (3)(Q). Also, the Ordinance regulates the content of speech because it discourages "the influx into Brevard County of persons seeking to observe and/or participate in such nudity." *Id.* (3)(R). Because all of the examples of content regulation exist in the Brevard County Ordinance, the Eleventh Circuit's failure to find that the Brevard County Ordinance is based on the content of the speech and expression is in direct conflict with the Sixth Circuit's decision in *Chabad*.

Finally, the Brevard County Ordinance is fatally flawed not only because those Findings appear in the Ordinance, but because by the Ordinance's own terms, each and every Finding is not severable because the intent and purpose of the Ordinance are expressly predicated on the facts stated in the Findings. (R1-Ex. A.)

CONCLUSION

The *Chabad* case shows a split between the Sixth and Eleventh Circuits regarding the recognition of an unconstitutional basis for an ordinance where that basis shows intent to restrict the content and/or viewpoint of speech, despite protestations by the government that no such restrictions are intended. The Sixth Circuit's holding would properly necessarily invalidate the Brevard County Ordinance at issue in the instant case as violative of the First Amendment.

Respectfully submitted,

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Supreme Court, U.S.
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No. 03-1109

In The Supreme Court of the United States

MARVIN V. FRANDSEN, JAN L. FRANDSEN, BRYAN MORRIS, FRANK J. CERVASIO, MARIANNE CERVASIO, DIAN HARDISON, and TONIANNE WYNER

Petitioners,

v.

BREVARD COUNTY, FLORIDA and BREVARD COUNTY SHERIFF PHIL WILLIAMS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S RESPONSE TO PETITIONERS' SUPPLEMENTAL BRIEF

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Respondent files this Response to Petitioners' Supplemental Brief and states as follows:

NO CONFLICT EXISTS WITH *CHABAD OF SOUTHERN OHIO V. CITY OF CINCINNATI*, 2004 WL 716870 (6TH CIR. APR. 5, 2004) AS THAT CASE IS FACTUALLY AND LEGALLY DISTINGUISHABLE FROM THE ONE UNDER REVIEW

No conflict exists between *Chabad of Southern Ohio v. City of Cincinnati*, 2004 WL 716870 (6th Cir. Apr. 5, 2004), and the decision under review because the ordinance at issue in *Chabad* was a content-based regulation directed at expressive conduct, and thus is legally and factually distinguishable from the instant case.

Petitioners once again attempt to equate the simple conduct of being nude with protected speech by claiming the Sixth Circuit's decision in *Chabad* somehow conflicts with the Eleventh Circuit's ruling. However, in *Chabad,* the ordinance at issue was directed at restricting the types of public displays that could be set up in a public square during the winter holidays. *Id.* at *8. During that time period, the city claimed exclusive use of the square so that it could control the content and design of the displays. *Id.* at *4. The city wanted to control the content and design of the displays to ensure that the displays would "appeal[] to the widest of audiences." *Id.*

The plaintiff in that case sought to display a menorah at the square. *Id.* at *2. While the city argued that plaintiff had "no free speech right to leave an unattended private structure on private property," the Sixth Circuit rejected that argument based on established precedent, and recognized that "the display of an object such as a

menorah is expressive activity for purposes of the First Amendment." *Id.* at *12.

However, in the case under review, Petitioners do not seek to engage in expressive activity, but merely seek to sunbathe or associate in the nude. The mere conduct of being nude, unlike the expressive activity in *Chabad*, is not expressive conduct entitled to First Amendment protection. *See South Florida Free Beaches, Inc. v. City of Miami, Florida*, 734 F.2d 608 (11th Cir. 1984). Thus, no conflict exists.

Further, in *Chabad,* the Sixth Circuit concluded that the ordinance at issue was content-based and thus subject to strict scrutiny. As Petitioners point out, the Sixth Circuit found that because the stated intention of the ordinance was to ensure that the speech and expression at issue appealed to the widest of audiences, the city necessarily wished to eliminate that speech or expression which might be controversial or offensive.

Petitioners claim that the instant Ordinance regulates the content of speech because it "forbids people to exploit nudity for profit or commercial gain and to advertise outside of Brevard County and the State of Florida the availability of an opportunity for nudity in public places." Petitioners' Supplemental Brief at p. 2. As an initial matter, this is a flat misstatement as the Ordinance places no restrictions whatsoever on advertising. Petitioners' Appendix of Initial Brief at p. 52a.

Further, unlike the ordinance at issue in *Chabad of Southern Ohio,* the Brevard County Ordinance is intended "to prohibit the conduct of being nude in public places," and is not addressed to speech or other constitutionally protected activity. Petitioners' Appendix at p. 48a. The

instant Ordinance also provides an exemption for nude expressive conduct that "is otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions." Petitioners' Appendix at p. 57a. Thus, the Sixth Circuit's decision in *Chabad of Southern Ohio v. City of Cincinnati* is both legally and factually distinguishable and no conflict exists.

CONCLUSION

Based on the foregoing, Respondent, Brevard County, Florida respectfully requests that this Court deny certiorari and refuse to accept jurisdiction of this matter.

Respectfully submitted,

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